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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 113

BUFORD MALONE, JR., PETITIONER

vs.

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

Supreme Court of the United States

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

• • • •

RICHARD ROE (BUFORD MALONE, JR.) AND UNITED STATES OF AMERICA, PETITIONERS

VS.

JOHN DOE (JAMES A. BOWDOIN, ET AL.)

REMOVAL PETITION—Filed May 18, 1959

[fol. 2] Now come Buford Malone, Jr. and the United States of America, petitioners, by and through their attorneys, Frank O. Evans, United States Attorney, and Floyd M. Buford, Assistant United States Attorney for the Middle District of Georgia, and show the Court the following facts:

1.

On the 7th day of May, 1959, the above-entitled action was commenced in the Superior Court, Jasper County, Georgia, against your petitioners; said action being an ejectment suit and involves lands that were acquired by the United States of America by deed on June 6, 1936, and your petitioners aver that the United States of American since acquiring said land has lawfully owned and possessed the same.

2.

Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

3.

At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest [fol. 3] Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office.

4.

A copy of the plaintiff's John Doe complaint, setting forth the claim for relief upon which this action was based, was first received by petitioner, Buford Malone, Jr., on May 9, 1959; the Sheriff of Jasper County having personally served a copy of the complaint on petitioner Malone on said date.

5.

Petitioner, United States of America, was served with copies of the complaint by mail; that is to say, counsel for the plaintiff mailed the Attorney General of the United States copies of the complaint on May 9, 1959; and the United States Attorney for the Middle District of Georgia, copies of the complaint on the same date, the United States Attorney for this district having received his copies on May 11, 1959.

6.

This petition is accompanied by a bond with good and sufficient surety, conditioned that your petitioner, Buford Malone, Jr., will pay all costs and disbursements incurred by reason of these removal proceedings, should it be determined that his action was not removable or was improperly removed.

[fol. 4]

7.

Petitioners file herewith a copy of all process, pleadings, and orders served upon them in this action.

Wherefore, petitioners pray that the said action may be removed from the Superior Court, Jasper County, Georgia, into this Court for trial and determination, as provided for by Title 28, Section 1442 of the United States Code.

This the 18th day of May, 1959.

FRANK O. EVANS
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford)
Assistant U. S. Attorney.

Duly Sworn to by Floyd M. Buford and Buford Malone, Jr. (Jurats Omitted in Printing.)

[fol. 5] IN THE
SUPERIOR COURT OF JASPER COUNTY, GEORGIA

PETITION—Filed May 7, 1959

Georgia,
Jasper County.

To the Superior Court of said County:

The petition of John Doe shows that Richard Roe has damaged him in the sum of Twenty-five Thousand Dollars; that on January 1, 1953, James A. Bowdein, Mrs. [fol. 6] Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Toland Barfield and Ridley Barfield demised to your petitioners for the term of 50 years from said date the following lands lying in said County, to-wit:

All that tract or parcel of land, situate lying and being in the 304th District of Jasper County, Georgia, contain-

ing one hundred nine (109) acres, more or less, and bounded North by the United States of America (formerly E. R. Roberts) East by United States of America (formerly Micheal M. Toland Estate); South by Juliette Milling Company, (formerly Charlotte Weatherbee) and West by Ocmulgee River;

and your petitioner duly entered thereon under said lease and afterwords on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

Wherefore your petitioner prays that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law.

W. B. MITCHELL.

W. B. Mitchell,
Attorney at Law,
Forsyth, Ga.

Filed in Office, this the 7th day of May, 1959.

C. B. POUND,
Clerk, Jasper Superior Court.

[fol. 7] IN THE
SUPERIOR COURT OF JASPER COUNTY, GEORGIA

PROCESS

Georgia,
Jasper County.

To the Sheriffs of the State of Georgia and Their Lawful Deputies:

EJECTMENT IN JASPER SUPERIOR COURT

JOHN DOE, EX DEM., James A. Bowdoin, Mrs. Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Roland Barfield, Ridley Barfield,

VS.

RICHARD ROE, casual ejector and Buford Malone, United States of America

August Term, 1959

The defendants, Richard Roe (i.e. Buford Malone Jr. and the United States of America) are hereby required to be and appear at the next term of the Superior Court on the appearance day of this case to be held in and for said County on the Second Monday in August, 1959 (August 10th, 1959) to answer the complaint of John Doe in ejectment; else the Court will proceed as to justice shall appertain.

Witness the Honorable George S. Carpenter, Judge of said Court this the 7th day of May, 1959.

C. B. POUND,
Clerk Superior Court.

[fol. 8] NOTICE TO THE REAL DEFENDANTS

To: Buford Malone Jr. and United States of America:

This to notify you of the filing of the foregoing suit in ejectment. As I have acted as casual ejector only, you are notified to appear and defend the action.

RICHARD ROE.

ENTRY OF SERVICE

I, W. B. Mitchell, Attorney for Petitioner, do hereby certify that I have served the Defendant United States of America, by mailing three copies of the foregoing petition, process and notice to the Hon. William P. Rogers, United States Attorney-General, Justice Department Building, Washington, D. C., and three copies to the Hon. Frank O. Evans, United States Attorney, Middle District of Georgia, P. O. Building, Macon, Georgia, by sending same by Registered Mail as provided by law.

This the 9th day of May, 1959.

W. B. MITCHELL,
Petitioner's Attorney.

W. B. Mitchell,
Attorney at Law,
Forsyth, Georgia.

Filed May 18, 1959.

[fol. 9] IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

REMOVAL BOND—Filed May 18, 1959.

Georgia,
Bibb County. ss.
Superior Court of Jasper County, Macon Division,
M. D. Ga.

No. 7387

Civil Action No. 1584

JOHN DOE,

v.

RICHARD ROE

Know all men by these presents, that we, Buford Malone, Jr., one of the defendants in the above-styled action, as principal, and Jack D. Edwards, as surety, are held and firmly bound to John Doe in the sum of Two Hundred Fifty and no/100 Dollars ($250.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators jointly and severally by this presents.

The condition of this obligation is such that:

Whereas, Buford Malone, Jr. has applied by petition to the United States District Court for the Middle District of Georgia, Macon Division, for the removal of a certain cause pending in the Superior Court of Jasper County, Georgia, wherein John Doe is plaintiff and Richard Roe is defendant, to the United States District Court for the Middle District of Georgia, Macon Division, for further proceedings on the grounds in said petition set forth:

[fol. 10] Now, therefore, if petitioner, Buford Malone, Jr., shall pay all costs and disbursements incurred by

reason of the removal proceedings if it should be determined that the cause was not removable or was improperly removed to the district Court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, we, the principal and surety, have caused this instrument to be executed this 18th day of May, 1959.

/s/ Buford Malone, Jr.,
(Buford Malone, Jr.),
Principal,

/s/ Jack D. Edwards,
(Jack D. Edwards),
Surety.

Witnessed:

John P. Cowart,
Clerk, U. S. District Court,
Middle District of Georgia.

Filed May 18, 1959.

IN THE UNITED STATES DISTRICT COURT

Order Extending Time for Filing Defensive Pleadings—May 19, 1959

For good cause shown, and on motion of the United States Attorney, it is Considered, Ordered and Adjudged that the United States of America and Buford Malone, [fol. 11] Jr. have until July 1, 1959 to file defensive pleadings in this case.

This the 19th day of May, 1959.

/s/ T. Hoyt Davis,
(T. Hoyt Davis)
United States Judge.

Filed May 19, 1959.

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT—Filed June 24, 1959

Come now Frank O. Evans, United States Attorney, and Floyd M. Buford, Assistant United States Attorney, representing the defendants, United States of America and Buford Malone, Jr., and move that the Court dismiss the complaint filed in this proceeding for the following reasons:

(1)

The complaint fails to state a claim against the defendants upon which relief can be granted.

(2)

The Superior Court of Jasper County, Georgia, does not have jurisdiction over the defendant, United States of America, nor does said Court have jurisdiction over [fol. 12] the defendant, Buford Malone, Jr., in this case, since the proceeding is in substance and effect against the United States of America.

(3)

The United States of America has not consented to be sued or waived its immunity from suit and the complaint affirmatively shows that Buford Malone, Jr. is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit.

Wherefore, the defendants, United States of America and Buford Malone, Jr., pray that the complaint be dismissed and costs be taxed against the plaintiff.

FRANK O. EVANS,
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant United States
Attorney.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing motion to dismiss on the Honorable W. B. Mitchell, counsel for plaintiff, by mailing a copy of the same to him at his post office address, to wit, Forsyth, Georgia.

[fol. 13] This the 24 day of June, 1959.

/s/ FLOYD M. BUFORD,
(FloydM. Buford),
Assistant U. S. Attorney.

Filed June 24, 1959.

IN THE UNITED STATES DISTRICT COURT

MOTION FOR MORE DEFINITE STATEMENT—
Filed June 24, 1959

Now come the defendants, Buford Malone, Jr., and the United States of America, by and through their undersigned counsel, after filing their motion to dismiss and expressly not waiving their contentions therein, and respectfully show that the complaint and claim of the plaintiffs herein, as appears from the allegations contained therein, are based on title and ownership of certain real estate and the plaintiffs are asserting that they have the right to possess the same and that the defendants are in possession of the same and are denying the plaintiffs the right of possession, the suit herein being one in the fictitious form of ejectment;

The plaintiffs describe the real estate that they are claiming ownership of in their complaint as follows:

All that tract or parcel of land, situate, lying and being in the 304th District of Jasper County, Georgia, containing one hundred nine (109) acres, more or less and [fol. 14] bounded North by the United States of America (formerly E. R. Roberts) East by United States of America

(formerly Micheal M. Toland Estate); South by Juliette Milling Company, (formerly Charlotte Weatherbee) and West by Ocmulgee River;

Defendants show that the complaint is so vague and ambiguous that they cannot reasonably be required to frame and file responsive pleadings thereto, and that in order for them to intelligently answer the complaint it is necessary and essential that they be furnished with a full, accurate, and detailed description of the real estate that the plaintiffs are claiming title to and the right to possession of, in the suit; and

Defendants show that the defendant, United States of America, owns several thousand acres of lands which are situated within the boundaries of the description alleged in the complaint, and the defendants, their agents and employees, have no way of knowing, and do not know, and the plaintiffs have failed to advise the defendants, of the specific real estate and the plaintiffs are claiming in this proceeding; and

Defendants show that many valuable improvements have been made on some of the land that is situated within the boundaries of the description set forth in the complaint, and the defendants do not know if such improvements or any part of them have been made on the property claimed by the plaintiffs; and if the defendants are not more fully advised of the specific property claimed by the plaintiffs, the defendants may and probably will be deprived of their rights of set off as provided for in Ga. Code Ann. 33-107; and

[fol. 15] Defendants show that in this suit the law requires the defendants to admit possession, lease, entry, and ouster (Ga. Code 33-111) and the filing of an answer by the defendants in this suit would be an admission on their part that they possessed all of the lands situated within the boundaries of the description set forth in the complaint when in truth and fact the defendants, their agents and employees, do not know whether the defendants are in possession of all the lands so described and defendants aver that it would be expensive and unreasonable for the defendants to have to survey all of the lands so described in the complaint in order to properly defend

this suit and such surveying would be time consuming and would delay a prompt disposition of this case; and,

Defendants show that this motion is not made for the purpose of delay, but earnestly believe that the description of the property as set forth in the complaint is not with sufficient definiteness to enable the defendants to properly prepare their answer and defense.

Wherefore, defendants move that plaintiffs be directed to make a more definite statement in their complaint in the particulars above mentioned.

FRANK O. EVANS,
United States Attorney,

By /s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant U. S. Attorney.

[fol. 16] AFFIDAVIT

Georgia,
Bibb County.

I, Floyd M. Buford, Assistant United States Attorney, have read the foregoing motion for more definite statement, and after being duly sworn, do hereby state that the facts and statements alleged therein are true and correct to the best of my knowledge and belief, that such facts and statements are based on information that deponent has obtained from the government files and agents.

This the 24th day of June, 1959.

/s/ FLOYD M. BUFORD,
(Floyd M. Buford).

Sworn to and subscribed before me, this 24 day of June, 1959.

/s/ BETTY M. JONES,
Deputy United States Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing motion for more definite statement on the Honorable W. B. Mitchell, counsel for the plaintiffs, by mailing a copy of the same to him at his post office address, to wit, Forsyth, Georgia.

This the 24th day of June, 1959.

/s/ FLOYD M. BUFORD,
(Floyd M. Buford),
Assistant U. S. Attorney.

Filed June 24, 1959.

[fol. 17] IN THE
UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING ANSWER—
June 24, 1959

It appearing to the Court that the defendants in the above-captioned case have filed their motions to dismiss and for a more definite statement, upon motion of the United States Attorney and for good cause shown,

It Is Ordered that the defendants do not have to file their answer in this case until the Court has ruled on said motion, at which time the Court will specify the time in which the defendants should file their answer.

This the 24th day of June, 1959.

T. HOYT DAVIS,
(T. Hoyt Davis),
United States Judge.

Filed Jun. 24, 1959.

IN THE UNITED STATES DISTRICT COURT

AMENDMENT BY PLAINTIFF—Filed Sept. 26, 1959

Comes now the plaintiff in the above stated case, and by leave of the Court first had and obtained, files this amendment in response to the Motion for More Definite Statement filed by the defendants and for amendment shows:

1.

Plaintiff amends said action by attaching hereto a copy of a plat of the one hundred and nine (109) acres of land claimed by plaintiffs.

[fol. 18] Wherefore, Plaintiff prays that this amendment be allowed.

/s/ W. B. MITCHELL,
Attorney for Plaintiff.

W. B. Mitchell,
Attorney at Law,
Forsyth, Georgia.

The foregoing amendment allowed subject to objection and demurrer, this the 26 day of September, 1959.

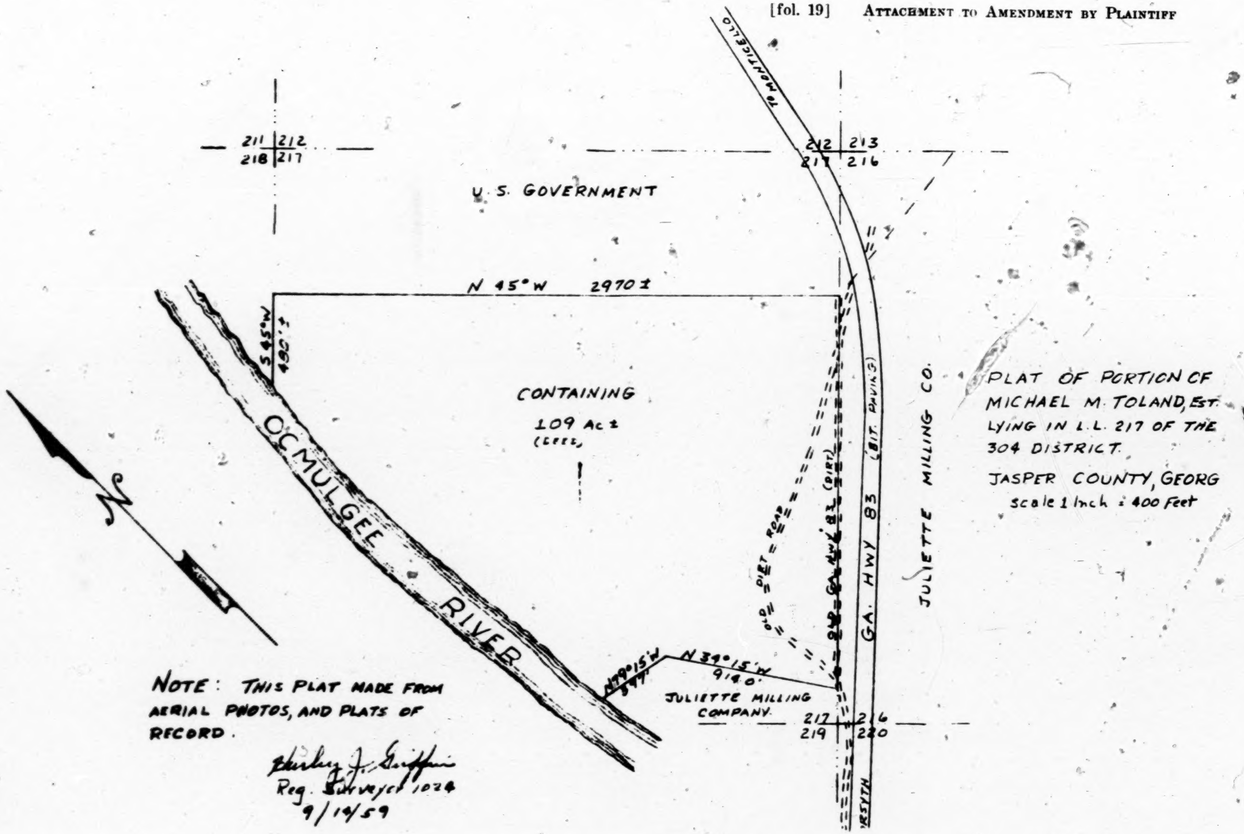
/s/ W. A. BOOTLE,
United States Judge.

Service of the foregoing amendment acknowledged this the 26 day of September, 1959.

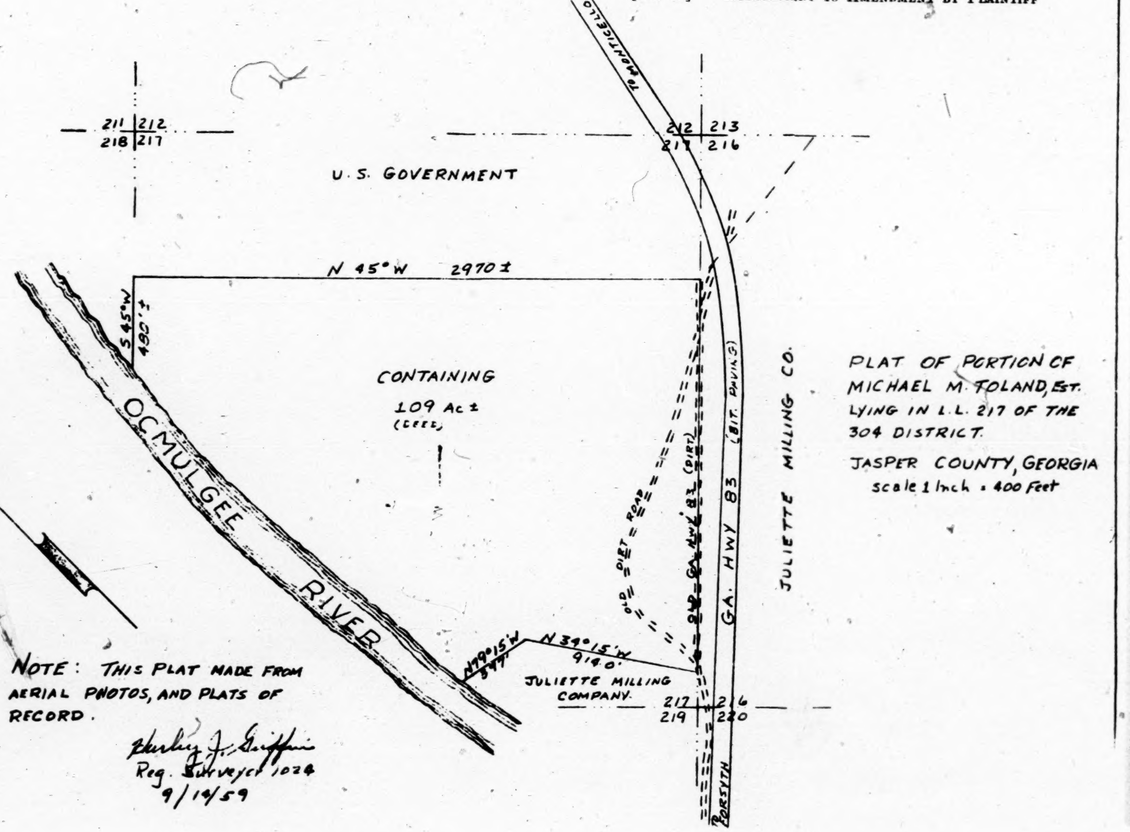
/s/ FLOYD M. BUFORD,
Attorney for Defendant.

Filed Sept. 26, 1959.

[fol. 19] ATTACHMENT TO AMENDMENT BY PLAINTIFF



[fol. 19] ATTACHMENT TO AMENDMENT BY PLAINTIFF



[fol. 20] IN THE
UNITED STATES DISTRICT COURT

OPINION GRANTING MOTION TO DISMISS—Dec. 29, 1959

Bootle, District Judge:

This suit in the fictitious form of ejectment was instituted in the Superior Court of Jasper County, Georgia, the real defendants being Buford Malone, Jr. and United States of America. It was thereafter removed into this Court upon petition of both defendants, which petition alleged in paragraphs 2 and 3 thereof as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

Thereafter, both defendants filed their motion to dismiss upon the grounds that the complaint fails to state a claim against the defendants upon which relief can be granted; that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not [fol. 21] consented to be sued or waived its immunity from suit and "the complaint affirmatively shows that Buford Malone, Jr. is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit."

Counsel were heard at a pre-trial conference on October 2, 1959 and upon written briefs and upon an adjourned pre-trial conference held this day.

While the complaint does not affirmatively show that Malone is being sued as an agent and employee of the United States, counsel for the plaintiff admitted at the pre-trial conference today that the above-quoted paragraphs 2 and 3 of the removal petition are true and correct. It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign.

Relying upon the cases of United States v. Lee, 106 U. S. 196, 27 L. Ed. 171 (1882); Sawyer v. Osterhaus, 195 Fed. 655, 212 Fed. 765 (N. D. Cal 1912); and Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947), plaintiff claims the right to maintain this ejectment suit against Malone, notwithstanding the fact that Malone has acted and is acting in the premises solely under color of his office and employment. Plaintiff frankly concedes that he cannot maintain this action against the United States itself.

This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of [fol. 22] Jones v. United States, 127 F. Supp. 31, 33 (E. D. N. C. 1954):

"However, in my opinion, United States v. Lee has been severely limited by Larson [Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 93 L. Ed. 1628 (194)9], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today."

The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887.

Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U. S. 682, 690. Not only is there no such allegation, but there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.

"The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." Rambo v. United States, 145 F. 2d 670, 671 (5th Cir. 1945), cert. denied, 324 U. S. 848, 89 L. Ed. 1408 (1945).
[fol. 23] Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order

This 29 day of December, 1959.

/s/ W. A. Bootle,
United States Judge.

Filed Dec. 29, 1959.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION

Civil Action No. 1584

John Doe (James A. Bowdoin, et al.), plaintiff

v.

Richard Roe (Buford Malone, Jr. and United States of America), defendants

Judgment—Dec. 30, 1959

Pursuant to the opinion rendered by this Court in the above-styled case on December 29, 1959, the motion of the defendants to dismiss the complaint is sustained, and

It is Considered, Ordered and Adjudged that the above-entitled action be, and it hereby is, dismissed.

This 30th day of December, 1959.

/s/ W. A. Bootle,
United States Judge.

Filed Dec. 30, 1959.

[fol. 24] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION

Civil Action No. 1584

JOHN DOE (James A. Bowdoin, et al.)

v.

RICHARD ROE (Buford Malone, Jr., and United States of America)

NOTICE OF APPEAL—Filed Jan. 26, 1960

Notice is hereby given that James A. Bowdoin, Mrs. Sara Bowdoin Gardner, Mrs. Lorine Bowdoin Land, E. R. Bowdoin, George Bowdoin, Mrs. Clotie Harkins, Mrs. Dorothy Schoonover, Mrs. Martha Emanuel, Toland Barfield, and Ridley Barfield, plaintiffs, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order of the District Court dismissing the complaint, which order was entered the 30th day of December, 1959.

/s/ W. B. MITCHELL,
(Wm. Buford Mitchell),
Attorney for Appellants.

Forsyth, Georgia.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Notice of Appeal on the Hon. Frank O. Evans and the Hon. Floyd M. Buford, counsel for defendants, by mailing a copy of the same to them at their post office address, to wit, P. O. Bldg., Macon, Georgia. [fol. 25] This the 26th day of January, 1960.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for Appellants.

Forsyth, Georgia.

Filed Jan. 26, 1960.

IN THE UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Now come appellants in the above-stated cause, after having filed its notice of appeal on January 26, 1960, and do hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal, such designated portions being as follows:

(1) The entire record in said case.

This designation is made pursuant to Rule 75, Rules of Civil Procedure.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for appellants.

[fol. 26] I do certify that I have this day served the defendants with a copy of the within designation of the record on appeal in the above case by mailing a copy of the same to the Hon. Frank O. Evans and the Hon. Floyd M. Buford, counsel for defendants, by mailing a copy of the same to them at their post office address, to wit, P. O. Building, Macon, Georgia.

This the 26th day of January, 1960.

/s/ W. B. MITCHELL,
(W. B. Mitchell),
Attorney for appellants.

Forsyth, Georgia.

Filed Jan. 26, 1960.

[fol. 27] CLERK'S CERTIFICATE OMITTED IN PRINTING

[fol. 28] • • • •

[fol. 29]

. . . .

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the Middle District of Georgia

OPINION—October 25, 1960

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges

CAMERON, Circuit Judge: Appellants James A. Bowdoin, et al filed an action in ejectment in a Georgia state court in the fictitious form of *John Doe* v. *Richard Roe*, [fol. 30] as provided by the statutes of Georgia.[1] Personal service was had upon appellee Buford Malone, Jr. by the sheriff of Jasper County, Georgia; service upon the United States was attempted by mailing copies of the petition to the Attorney General of the United States and to the United States Attorney, thus revealing that the "true claimants" were the appellees Buford Malone, Jr., and the United States of America.

The appellees removed the case to the United States District Court, where they moved to dismiss the com-

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[1] Vol. 12, Code of Georgia, Annotated, Title 33, § 111:

"*Consent Rule. Fictious forms in pleading.*—The consent rule in ejectment shall always be considered as filed, and admits lease, entry, and ouster. The fictitious forms in pleading in ejectment shall be sufficient. Cf. Horn v. Towson, S.Ct. Ga. 1926, 135 S.E. 487.

plaint for failure to state a claim upon which relief could be granted; because the state court did not have jurisdiction over the United States or Malone, and the United States had not consented to be sued or waived its immunity from suit; and because Malone was being sued "as an agent and employee of the United States, and, as to him, the suit is in substance and effect one against the United States; thus the United States is an essential and indispensable party to the suit." [2]

[fol. 31] The entire argument of both litigants assumes that the uncontroverted averments of the petition of the appellants are sufficient to require answer by the appellee Malone and to a trial, unless the court below properly

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[2] Neither in the motion nor in appellees' brief is it argued that the petition filed by appellant was in any way insufficient to bring the appellees within the scope and protection of the statutes of Georgia, some of which are quoted here:

12 Code of Georgia Annotated, Title 33, § 102: *"Plaintiff may recover on his prior possession, when.*—A plaintiff in ejectment may recover the premises in dispute, upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever."

Ib. Title 33, § 104: *"Mesne profits, how recovered.*—The plaintiff in ejectment may add a count in his petition, and submit the evidence to the jury, and recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute."

Ib. Title 33, § 114: *"True claimant made defendant; effect of judgment.*—A plaintiff in ejectment may in all cases make the true claimant defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment."

Ib. Title 33, § 120: *"Writ of possession; issuance; contents.*—When a verdict in ejectment shall be rendered in favor of the plaintiff, and a judgment entered thereon, the clerk of the superior court shall issue a writ of possession, in which the clerk shall incorporate a clause directing the sheriff to collect, by levy and sale of the defendant's property, all such sums of money shall have been awarded to such plaintiff in ejectment as mesne profits and costs."

Ib. Title 33, § 121: *"Against whom writ of possession may issue.*—The writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, nor put in possession by, or claiming under or by virtue of any conveyance from the defendant in such suit."

granted his motion, as well as that of the United States, to dismiss because of want of jurisdiction. Both parties conceded in the trial court and before us that the United States was not legally before the Court and that the action against it should be dismissed. The sole question remaining, therefore, is whether this statutory action in ejectment states a claim against appellee Buford Malone, Jr., Forest Service Officer, United States Department of Agriculture, whose official duties required him to be, and who was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States.

[fol. 32] The court below granted Malone's motion to dismiss on the ground "that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not consented to be sued or waived its immunity from suit."[3]

It is manifest that the court below did not base its decision on what the District Court for the Eastern District of North Carolina *did* in the *Jones* case, but adopted only a portion of what the district court there *said*. The fact is that the *Jones* suit involved, not only ejectment, but partition of lands in which Jones claimed to own a two-thirds interest, which the United States had taken

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[3] The court's reasons were thus amplified in its written opinion: "This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of Jones v. United States, 127 F. Supp. 31, 33 (E.D. N.C. 1954):

"'However, in my opinion, United States v. Lee has been severely limited by Larson [Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628 (1949)], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today.'

"The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887. . . .

"Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order."

without paying compensation under the Fifth Amendment. It appears from the decision that Dennis, the agent in charge of the tract of land, did not move to dismiss and did not ask summary judgment. Only the United States filed such motions. The final paragraph of *Jones* (127 [fol. 33] F. Supp. 33) shows the action taken by the court in that case: "It does not clearly appear that this Court has no jurisdiction to entertain the case in any of its aspects, and the court, therefore, denies both motions of the United States to dismiss as upon summary judgment."

We will not, however, confine this opinion to differentiating the *Jones* case from the case before us, as the argument of appellees is patched upon the assumption that, if the *Lee* case has not been entirely overruled, "there may be no cases at all in which United States v. Lee will permit suit today,"—as was said in *Jones* and apparently adopted by the court below.

In comparing the case before us with decisions in other cases which will be discussed, and in determining whether the facts here come within the holding of *United States* v. *Lee*, 1882, 106 U.S. 196—much watered down under the opinion of the court below and the argument of appellee here—we must follow the general rule:[4] "'. . . that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of fact which could be proved in support of his claim. . . . Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the plead-[fol. 34] ings.'" This makes it necessary that the salient portions of the petition be set out.[5]

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[4] Stated by us in Des Isles v. Evans, et al, 1952, 200 F.2d 614, 615-616.

[5] "The petition of John Doe [James A. Bowdoin, et al] shows that Richard Roe [Buford Malone, Jr.] has damaged him in the sum of Twenty-five Thousand Dollars; for that on January 1, 1953, James A. Bowdoin [and nine others] demised to your peti-

Under this petition and the statutes of Georgia above quoted it is apparent that appellant would be able to prove: That they were, on the crucial dates, the true owners of such title to the lands involved as would support the leasehold interest they sought to establish; that the United States did not own any title to the lands which would defeat appellant's claims; that appellee Malone was in wrongful possession of said lands as agent of a principal which did not have any claim thereto, and that he had ousted appellants of their rightful possession; and that, based upon said tortious acts of appellee Malone, appellants are entitled to money damages and the possession of the land during the claimed term of the leasehold.[6]

[fol. 35] It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that "the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, . . ." The sole question pre-

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tioners for the term of 50 years from said date the following lands in said County, to-wit:

". . . and your petitioner duly entered thereon under said lease and afterwards on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

"Wherefore your petitioner prays that process issue requiring Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law."

[6] Kauffman v. Deese, S. Ct. Ga., 1949, 205 Ga. 841, 55 S.E.2d 358, and Vinson v. Cannon, S. Ct. Ga., 1957, 213 Ga. 339, 99 S.E.2d 106. In the latter decision the general rule is stated, at page 109 of 99 S.E.2d:

"Needless to say the fictitious forms of pleading in ejectment are still the law in this State, with defendant admitting the lease and entry of the plaintiff and his ouster by the defendant from the lands involved. Code § 33-111; Code Ann. Supp. § 24-3344. . . . The purpose of the action is to eject the defendant from possession of the land involved. . . ."

sented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

If the *Lee* case is still the law applicable to ejectment suits of this character, it is plain that the complaint before us states a claim upon which relief can be granted, and that the appellee Malone is not protected by any sovereign immunity of the United States which may be present in such circumstances. Indeed neither the court below nor appellee's counsel seem to question this statement. If they did, the *Lee* case would reject their argument entirely, because the facts of the *Lee* case and those of the present case are identical in their legal effect. A comprehensive look at the *Lee* case is indicated.[1]

The Arlington estate of General Robert E. Lee had, during The War Between The States, been seized for nonpayment of taxes. Under the jury's findings these [fol. 36] taxes had in fact been tendered by a friend, but the tax collector had interpreted his authority as permitting payment of the taxes only by the record owner. After the United States had seized the lands, it established a fort and cemetery thereon. The plaintiff, in whom title to the land vested if its seizure could not be justified, brought an action of ejectment against the agents of the government in possession of the estate. The trial court overruled the suggestion of the Attorney General of the United States that the trial court was without jurisdiction, based on the ground that the property was in the possession of the United States. The ejectment action was tried to a jury, which found against the government agents, deciding that the attempted proof did not establish title in the Government and that the agents' possession was not, therefore, legally justified. The Supreme Court affirmed, holding that the lower court was competent to decide the issues between the parties without the presence of the United States whose consent to be sued had been withheld.

A close reading of *Lee* reveals that, although some of the language of the opinion referred to taking prop-

[1] 106 U.S. 196.

erty without just compensation, its real basis was that the government agents were ordinary tort feasors, not immunized for their wrongful trespass upon the plaintiff's property by the fact that they claimed to be acting on behalf of the government. It was admitted that Kaufman, Strong, et al who were actually holding the land were doing so as agents in possession of the property [fol. 37] of the United States. A few excerpts from the exhaustive *Lee* opinion will suffice to epitomize its holdings:

> "This proposition [that the court can render no judgment for the plaintiff and against the defendants because they hold the property as officers and agents of the United States, and that the property was appropriated to lawful public uses] rests on the principal that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government. . . . [106 U.S. p. 204]
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> "On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit. . . . [ib. pp. 207-208]
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> "Under our system the *people*, . . . are the sovereign. . . . The citizen here knows no persons, however near to those in power, or however powerful [fol. 38] himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural

or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. . . . [pp. 208-209.]

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. . . . in this case . . . , after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States. . . . [Ib. p. 210.]

"'. . . The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; . . . This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which [fol. 39] they would afford against him could his principal be joined in the suit.' . . . [Ib. p. 213.]

"This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, . . . [Ib. pp. 215-216.]

"That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided. . . . [Ib. p. 217.]

"It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. . . . [Ib. p. 219.]

[fol. 40] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . [Ib. p. 220.]

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, . . . the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen. . . . [Ib. p. 221.]

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the govern-

ment, . . . the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion [fol. 41] of its rights. *Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.* . . . [Emphasis supplied—Ib. pp. 222.]

"The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is Affirmed."

From these excerpts it is clear that the *Lee* case went considerably farther than the court below was asked to go in this case. Admitting that the United States was not properly made a party and that it would not be bound by the judgment,—a principal established also by Georgia Statutes in Footnote 2 *supra*—appellants sought, by a proper judicial proceeding, merely to have interlopers put off of their land by an action at law in ejectment. If *Lee* has any vitality at all, the judgment of the court below must be reversed.

And what of *Lee*? Has it ever been overruled by the Supreme Court? The court below did not so hold and appellee's argument does not directly make such a contention. All the court below said was, quoting from a six year old district court decision, that *Lee* "has been [fol. 42] severely limited by Larson, and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today." A study of the cases decided both before and after the one the court below quoted from will demonstrate that the latter portion of the quoted statement is entirely without foundation.

Examination of Shepard's United States Citations reveals that the *Lee* case has been cited three hundred ninety-six times. It has appeared in decisions of the Supreme Court fifty-eight times in seven of which it has been "distinguished," and in four "explained." It would seem from this that the editors of Shepard's consider that, in the remaining forty-seven cases, no fault has been found with *Lee*. It should be noted in passing that, where the Supreme Court has "distinguished" the *Lee* case, it has compared it with the case then before the court and has decided that *Lee* was inapplicable, because its facts did not control those of the case under consideration. With respect to the quoted statement of the court below that the possible distinction between *Lee* and *Larson* was that *Lee* was decided in 1882 before the enactment of the Tucker Act in 1887, it should be noted that fifty of the fifty-eight Supreme Court decisions referred to *supra* have been decided since March 3, 1887 and also that this contention was specifically rejected in *Dollar*, *infra*.

[fol. 43] Probably the most significant point about this phase of the argument is that nobody has suggested that there is any authoritative holding that the *Lee* case does not now cover ejectment suits just as fully as it did the day of its rendition. The argument that its application has been severely limited has arisen when the principles of *Lee* was sought to be applied to other and often quite different situations, governed by entirely different rules of law. A reading of those cases will reveal also that there have been no clear-cut distinctions between the facts to which *Lee's* principles apply and those to which it does not apply—no blacks and whites, only varying shades of gray.

Mr. Justice Frankfurter, in his dissent in the *Larson* case,[8] has done a masterful job of analyzing a large number of the cases dealing with the principles of Lee and assigning them to categories and sub-categories in an effort to draw the line as distinctly as varying facts will permit. Starting with the statement (P. 706): "There is,

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[8] 337 U.S. 705-732.

however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particularly circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict," he asserts that some of the confusion "is doubt-[fol. 44] less due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. . . . In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts." [Pp. 708-709.] And, as further support of his statement, he cites the speed with which the Eleventh Amendment was passed after the Supreme Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), along with the cases of *New Hampshire* v. *Louisiana*, 108 U.S. 76, 86-88; *Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 396, and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245, where the Supreme Court held that the doctrine of sovereign immunity was in disfavor, as well as Borchard's bibliography in 20 A. B. A. J. 747, 748, and the materials in Judge Mack's opinion in *The Pesaro*, 277 F. 473, reversed, 271 U.S. 562. To these might be added the several Acts in which Congress has specifically withdrawn sovereign immunity, such as the Federal Tort Claims Act, 28 U.S.C.A. § 2671, et seq., Federal Old Age, Survivors and Disability Insurance Benefits Act, 42 U.S.C.A. § 405(g), and I.R.C. 1954, § 7422, et seq.

We will not attempt a general discussion of the cases, referring instead to Mr. Justice Frankfurter's dissent *supra* as presenting a fair and exhaustive examination of the leading cases.

[fol. 45] The court below cites in its opinion as authority for the judgment rendered, a case from this Court, *Rambo* v. *United States*, 145 F.2d 670, 671 (1945), certiorari

denied, 324 U.S. 848, 89 L. Ed. 1408 (1945). It quotes from that decision this sentence: "The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." It is sufficient to answer that the case before us is not such a case as the court below there described. This is not a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. This is purely a common law action in ejectment, as recognized and defined by Georgia's statutes, and involves merely a dispute between individuals for possession of the land.

The main reliance of the court below was the *Larson* case, as is the argument of appellees here. Before taking up discussion of that case we ought to consider the decision of the Supreme Court two years earlier in *Land, Chairman, United States Maritime Comm. et al* v. *Dollar, et al*, 1947, 330 U.S. 731.

Dollar was a case where members of the United States Maritime Commission had physical control of the property in question, but it was claimed by Dollar that the property was wrongfully withheld. The Supreme Court approved the principle that the trial court had authority to proceed on the merits in order to determine whether [fol. 46] the plaintiff's claim that the withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. The court specifically applied the principles of *Lee* as they are reinforced by such cases as *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 1922, 258 U.S. 549; *Goltra* v. *Weeks*, 1926, 271 U.S. 536, and *Ickes* v. *Fox*, 1937, 300 U.S. 82. Mr. Justice Douglas, speaking for an unanimous court (Mr. Justice Black not participating), stated:

> "Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of United States v. Lee supra has been repeatedly approved. [Eight Supreme Court cases

cited.] . . . In United States v. Lee supra record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not res judicata against the United States, page 222, it settled as between the parties the controversy over possession. . . .

"We do not trace the principles of United States v. Lee supra, in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. . . . It is not an attempt to get specific performance of a [fol. 47] contract to deliver property of the United States . . . It is not a case where the sovereign admittedly had title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Act of Congress. . . .

". . . But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The 'essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration . . . But public officials may become tort feasors by exceeding the limits of their authority. *And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*

"It is in the latter category that the pleadings have cast this case. That is to say, if the allega-

tions of the petition are true, the shares of stock never were the property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, [fol. 48] suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against the petitioners, though, as we have said, the judgment would not be res judicata as against the United States. . ."[9] [Emphasis added.]

In considering *Larson*, let it be understood that the opinion had the unconditional concurrence of only a minority of the Supreme Court, to-wit, Chief Justice Vinson and Justices Black, Reed and Murphy, all of whom, except Justice Black, had concurred in *Dollar*. Mr. Justice Douglas, author of *Dollar*, joined in the opinion only because the case involved the minutiae of the intricate machinery of sales by the world's largest merchant.[10] Mr. Justice Rutledge concurred in the result, while Justices Frankfurter, Jackson and Burton dissented, the dissenting opinion of Justice Frankfurter having been above referred to several times.

The majority opinion in *Larson* is susceptible of being construed as questioning some of the fundamental bases of *Lee*. As Mr. Justice Frankfurter points out,[11] to [fol. 49] ascribe to *Lee* the effect which some of the language of *Larson* would seem to justify would be to over-

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[9] 330 U.S. pp. 737-739.

[10] His concurrence states: "I think the principles announced by the Court are the ones which should govern the selling of government property. Less strict application of those principles *would cause intolerable interference with public administration.* To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer *would clog this governmental function with intolerable burdens.* So I have joined the Court's opinion." [Emphasis added.]

[11] 337 U.S. at pp. 718-720 et seq.

rule, not only *Lee*, but many other Supreme Court cases, including landmark decisions by Mr. Justice Holmes, *Sloan Shipyards Corp.* v. *United States*, 1922, 258 U.S. 549, 567-568, and Chief Justice Taft, *Goltra* v. *Weeks*, 271 U.S. 536. The dissent quotes from the decision of Mr. Justice Holmes:

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred." [337 U.S. pp. 719-720.]

Larson is a suit for injunction and declaratory judgment against the head of the War Assets Administration upon which a restraining order was issued ex parte. The opinion stresses (page 686): "Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action." Injunctive relief was sought against the Administration for wrongs allegedly committed by its subordinate officials. The crucial paragraph in the *Larson* decision, the one [fol. 50] which differentiates that case from the one before the Court below and which supports our holding here is this:

> "Before answering that question it is perhaps advisable to state clearly what is and what is not involved. *There is not involved any question of the immunization of government officers against responsibility for their wrongful actions.* If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." 337 U.S. 686. [Emphasis added.]

The emphasized words describe exactly what is involved in this action. Appellants claim that appellee Malone is wrongfully and tortiously holding possession of their lands as agent for the United States, which does not have the right of such possession. We think that this is a valid and basic differentiation between *Larson* and this case.

We think it is significant also that the Supreme Court did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case. The special concurring opinion of Mr. Justice Douglas helps to clarify the scope and content of the differentiation. The fact that three Justices who, a scant two years before, had concurred in *Dollar*, also concurred in *Larson* carries a strong inference, we think, that they were not subscribing at all to a doctrine which would, in such a basic aspect, cut the ground from under *Dollar* and *Lee*. At all events, [fol. 51] whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent:[12]

> "These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case."

It is worthy of note also that, since *Larson*, *Lee* has been cited with approval in the concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General, et al*, 1951, 341 U.S. 123, 152; and also by him, speaking for an unanimous court,[13] in *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226. *Dollar* has, since *Larson*, been cited with approval in the concurring opinion of Mr.

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[12] 337 U.S. 713.

[13] Mr. Justice Douglas dissented in part, 352 U.S. 230, but he concurred in the portion of the opinion in respect to which *Lee* was cited.

Justice Douglas in *Georgia Railroad and Banking Co.* v. *Redwine, Etc.*, 1952, 342 U.S. 299, 307. Neither *Lee* nor *Dollar* has been questioned by the Supreme Court in any subsequent opinion, as far as our search has revealed.

Larson has been quoted in the opinion of the Court by Mr. Justice Burton in *Anti-Fascist Committee* v. *McGrath supra* at page 140 as follows: "The respondents [fol. 52] are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer's statutory powers or, if within those powers . . . if the powers, or their exercise in the particular case, are constitutionally void.'"

Mr. Justice Frankfurter, dissenting in *Snyder* v. *Buck, Paymaster*, 1950, 340 U.S. 15, 29, cited his dissent in *Larson* and added further remarks concerning the increasing disrepute of the doctrine of sovereign immunity.[14]

In summary, it is clear that, however broad the apparent sweep of the limitations placed upon *Lee* by some of the courts may be, the Supreme Court has never questioned its controlling validity in possessory actions

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[14] "In scores of cases this Court has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See Keifer & Keifer v. R. F. C., 306 U.S. 381, 390-392. If astuteness has been exercised to deny the representative character of an official in order to avoid his identification as the sovereign *ad hoc*, it runs counter to the rational administration of justice not to find an official the sovereign *ad hoc* and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby."

[fol. 53] like ejectment, seeking to oust the government's agents from wrongful possession growing out of their tortious or illegal acts. That is all this case involves. The unanimity with which the principles here approved have been upheld springs, doubtless, from the conviction that the implied immunity of the government itself should be extended to its agents only with great caution; and from the realization that the government, in such a suit as this, has the simple option of filing a counterclaim aimed at quieting its challenged title or of raising the same issues in an independent proceeding.

We hold that the action against appellee Malone is not foreclosed because he possesses the land as agent for the government; and the judgment of the court below is reversed and the case is remanded for further and not inconsistent proceeding.

REVERSED AND REMANDED.

RIVES, Chief Judge, Dissenting:

The district court's clear and able opinion reported in . . . . F.Supp. . . . . shows that ". . . counsel for the plaintiff admitted at the pre-trial conference today that the above quoted paragraphs 2 and 3 of the removal petition are true and correct."[1] From that admission, [fol. 54] the district court correctly concluded: "It does now appear, therefore, that Malone does not purport to

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[1] Those paragraphs read as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Muford Malone, Jr. was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

act in the premises as an individual but solely as an official or employee of the sovereign."[2] The appellants make no denial of any of these admissions of fact upon which the district court's opinion and judgment were based.

Malone might not be immunized from personal liability in damages, but a writ to oust Malone from the possession which he holds solely on behalf of the United States would interfere with governmental functions. It seems to me that the full discussion in *Larson* v. *Domestic and Foreign Corp.*, 1949, 337 U.S. 682, demonstrates that this action was properly dismissed as a suit against the United States to which it had not consented. See also, *Georgia R. Co.* v. *Redwine*, 1952, 342 U.S. 299, 304; *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226; *Stewart* v. *United States*, 5 Cir., 1957, 242 F.2d 49, 51; Hart and Wechsler, The Federal Courts and the Federal System, pp. 1169-1180. I respectfully dissent.

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[2] Later in the opinion, the district court said:

"Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U.S. 682, 690. Not only is there no such allegation, but *there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.*" (Emphasis supplied.)

[fol. 55]

• • • •

No. 18222

JAMES A. BOWDOIN, ET AL,

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA

JUDGMENT—October 25, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

"Rives, Chief Judge, Dissenting."

[fols. 56-64] • • • •

[fol. 65] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

PETITION OF THE APPELLEE FOR REHEARING EN BANC—
Filed Dec. 20, 1960

Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, appellee, by the undersigned attorneys of the Department of Justice, presents this petition for a rehearing and requests that such hearing be had *en banc*, and in support thereof respectfully shows:

The appellants instituted this ejectment proceeding in a court of the State of Georgia. During the pre-trial conference in the federal district court to which the action was removed, the appellants admitted that the action cannot be maintained against the United States itself and that Malone is acting solely under color of his [fol. 66] office and not as an individual. Based upon these admissions and the appellants' failure to allege that Malone is acting beyond constitutional or statutory authority, the district court dismissed the complaint for want of jurisdiction.

Upon appeal, the appellee contended that an action to eject a federal officer from land to which the United States claims title is a suit against the United States over which the court has no jurisdiction in the absence of consent. The appellee also maintained that dismissal was proper because the appellants do not allege that the federal officer is acting individually, rather than for the sovereign, or beyond constitutional or statutory authority. This Court held, Chief Judge Rives dissent-

ing, that this action could be maintained against the federal officer.

The majority decision rejecting this argument should be reheard by the full bench of this Court because:

1. Important principles are involved and many cases within this Circuit wherein the title of the United States is sought to be challenged will be controlled at the trial court level by this opinion.

2. The majority opinion regresses in effect to the discredited view that whether a suit is against the United States is determined by its presence as a formal party.

3. The majority opinion is in conflict with decisions of the Supreme Court, this Circuit, and other circuits. [fol. 67] 4. The majority opinion is based upon an erroneous premise as to Georgia law.

For these reasons, elaborated in the accompanying brief, the appellee now petitions for a rehearing *en banc.*

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

FRANK O. EVANS,
United States Attorney,
Macon, Georgia.

FLOYD M. BUFORD,
Assistant United States Attorney,
Macon, Georgia.

ROGER P. MARQUIS,
/s/ Raymond N. Zagone.
RAYMOND N. ZAGONE,
Attorneys,
Department of Justice,
Washington 25, D. C.

DECEMBER 1960

[fols. 68-95] • • • •

[fol. 96] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

SUPPLEMENT TO BRIEF IN SUPPORT OF THE APPELLEE'S PETITION FOR REHEARING EN BANC—Filed Jan. 4, 1961

Continuing research in the Department files in this case and others has yielded highly material information which was not available at the time the appellee's Petition for Rehearing *En Banc* and Brief in Support were submitted. Because of the information's relevance, this supplement, presenting an additional reason for rehearing *en banc*, is filed.

[fol. 97] V

The Remedy Available to the Appellants to Establish Their Claim to Title Expired in 1942, and, Hence, Torturing the Doctrine of Sovereign Immunity to Give the Appellants Another Remedy Is Not Justified

The basis of the appellants' claim does not appear upon the face of the complaint itself only because the complaint follows the fictitious form of ejectment pleading. (R. 5). But the bases of both the appellants' and the United States' claims to title are before this Court. The United States acquired the lands involved by deed dated June 6, 1936, and has been in possession since that time (R. 2). The appellants base their claim upon a will executed and recorded over 100 years ago in 1857 (Br. 3). Reference is made in the appellants' brief to

their having apprised the appellee and the United States of their "contentions of ownership" (Br. 3). The appellants' letter, accompanying their complaint and setting forth their contentions, is printed as an appendix to this supplement.

It thus appears that the testator in 1857 devised a life estate in certain land to one of his daughters, Martha A. Sanders (*nee* Toland), with remainder over to her children. The appellants are said to be her children and grandchildren. In 1873, the devisee conveyed the land, evidently in fee, to mesne grantors of the United States. The appellants are not averred to have ever been in actual possession.

It is obvious, therefore, that the appellants are asserting a stale claim and that their action would founder even under the Georgia seven-year or twenty-year pre-
[fol. 98] scription statutes, 24 Ga. Code Ann. (1955 revision) secs. 85-406 and 85-407, as against the 1936 deed upon which the United States bases its claim, not to mention the many years when suit could have been brought against the Government's predecessors in title.[1] And it cannot be maintained that the doctrine of sovereign immunity at all times precluded the appellants from having their interests adjudicated, even as against the United States. For Congress provided the appellants with a reasonable remedy in the Tucker Act, 28 U.S.C. secs. 1346(a) and 1491, where Congress waived the sovereign's immunity for the assertion of such claims. But in so doing, Congress imposed conditions upon that waiver, which is clearly within its power. One condition, especially applicable here, is that the claim be asserted within six years after the right of action first accrues. 28 U.S.C. sec. 2401(a).

To be noted in this connection is the majority's observation of the many instances "in which Congress has

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[1] It is interesting to note that the opinion of the trial court in the *Lee* case recites that the plaintiff there commenced his ejectment action within the period of Virginia limitations, which is an additional difference between that case and the one presented by the appellants. *Lee* v. *Kaufman*, 15 Fed. Cas. No. 8,191 at 163 (C.C. E.D. Va. 1879).

specifically withdrawn sovereign immunity * * *" (slip opinion, p. 16). Indeed, this is so, but it must also be observed that the waivers have not been without significant qualifications and pursuant to a consistent congressional policy. As just discussed, Congress in the Tucker Act waived the sovereign's immunity for only six years [fol. 99] from the date the right of action first accrues. 28 U.S.C. sec. 2401(a). Another example is the Federal Tort Claims Act, 28 U.S.C. secs. 1346(b) and 2671, *et seq.*, where Congress, in addition to imposing a limitation period for the assertion of tort claims, excepted a large number of claims, including actions based upon the exercise by federal officers of discretionary functions. 28 U.S.C. secs. 2401(b) and 2680. More important here than the conditions Congress has imposed in such statutes is the mode of relief Congress has authorized—relief in the form of *damages* for claims seasonably asserted. The usual relief afforded by Congress in raising the bar of immunity has not been in the form of specific relief, except in certain private acts. This was recognized by the Supreme Court in the *Larson* case, 330 U.S. at pp. 703-705, in the statement (at pp. 703-704):

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for [fol. 100] the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its

> tracks by any plaintiff who presents a disputed question of property or contract right. * * *.[2]

It is not only the community as a whole as represented by the Government which benefits from these "strongest reasons of public policy," and from the restrictions imposed upon consents to suits against the sovereign. The courts themselves are thereby protected from a flood of litigation. But even with such conditions, stale claims, like the appellants', continue to be urged upon the courts. In *Andrews* v. *White*, 221 F.2d 790 (C.A. 6, 1955), affirming 121 F.Supp. 570 (E.D. Tenn. 1954), for example, the record discloses not only that none of the claimants there had ever been in actual possession of the land or had even been upon the land for more than 35 years, but also that taxes had not been assessed or paid for more than [fol. 101] 20 years prior to bringing the suit. In *Young* v. *Anderson*, 160 F.2d 225 (C.A. D.C. 1947), cert. den. 331 U.S. 824, reh. den. 331 U.S. 868, the opinion itself shows that the claim was grounded upon transactions occurring more than 10 years prior to suit. Similarly, in *Stewart* v. *United States*, 242 F.2d 49 (C.A. 5, 1957), the United States' acquisition of land by condemnation proceedings concluded 10 years prior to suit was questioned, as shown by the record in that case. The appellants' claim here is in this general category of dormant claims, which is barred by Georgia prescription statutes as well as by the conditions placed upon the reasonable remedy Congress afforded in relaxing the sovereign's immunity.

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[2] The relief sought in the present action—possession—is thus the very thing that produces interference with government activity. Until the time limit ran, the Tucker Act gave to appellants as complete a remedy as they were entitled to because, if the government agency concerned did not desire to keep the land if it were held that the Government did not have title, that fact could have been made known in partial defense of the Tucker Act case, since, absent express indication of intent by authorized government officers, it would have been somewhat doubtful whether the taking was temporary or permanent. See *United States* v. *Causby*, 328 U.S. 256 (1946). On the other hand, if permanent retention of the land was needed for governmental purposes, there would then have been a taking of fee title.

Moreover, related to the enlightened view of sovereign immunity, is the Government's willingness to bring its own actions to quiet titles to lands owned by it where substantial, reasonable, and active claims may be asserted by private citizens. See, e.g., *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *United States* v. *Patterson*, 206 F.2d 345 (C.A. 5, 1953).

[fol. 102] Hence, it cannot be seriously asserted that the sovereign's position in these matters has been medieval, nor that the appellants here were always without a remedy. These facts emphasize the correctness of application here of the doctrine of sovereign immunity.

Respectfully,

/s/ Perry W. Morton
PERRY W. MORTON,
Assistant Attorney General.

FRANK O. EVANS,
United States Attorney,
Macon, Georgia.

FLOYD M. BUFORD,
Assistant United States Attorney,
Macon, Georgia.

/s/ Roger P. Marquis
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys, Department of Justice,
Washington 25, D. C.

DECEMBER 1960

[fol. 103] APPENDIX TO SUPPLEMENT

WM. BUFORD MITCHELL
Attorney at Law
Forsyth, Ga.

May 9, 1959

Hon. William P. Rogers,
Attorney-General,
Justice Department,
Washington, D. C.

Hon. Frank O. Evans,
United States Attorney,
Middle District of Georgia,
Post Office Building,
Macon, Georgia.

Gentlemen:

I have filed an ejectment in Jasper Superior Court, Monticello, Georgia, a county within the jurisdiction of the Middle District of Georgia, Macon Division, of the United States of America to recover 109 acres of land. This suit is under the Georgia Law known as the fictitious form of ejectment and have had or will serve Mr. Buford Malone, Jr., of Jasper County as on tenant in possession. Mr. Malone is the agent of the Interior [sic] Department in charge of said land and is a necessary party to the case. I herewith serve the United States of America with process by sending each of you two gentlemen three copies each of the petition, process and notice by registered mail.

I herewith present to you our contentions that the land belongs to my clients upon the following grounds:

Will of Michael M. Toland, recorded in Will Book 14, page 116 on August 7, 1857, Item 4 reading as follows:

[fol. 104] 4th. I will and bequeath unto my youngest children, to-wit: Those by my last wife namely, Charlott, Michael, Martha, Sealy, Patience, Tomlinson, Salle and James Washington the following negroes, viz: Old Dick, Suckie, Ben, Adam, Young Dick, John, George and Daniel,

and I also will and bequeath unto them the children named above in this item my river plantation and the Aquilla tract, and Mitchael home place on which I now live, except one hundred acres, on the south side adjoining my Taylor tract which property negroes and land I desire to be applied to the making of my younger children named above in this item, equal in property to my oder [sic] children named in the third item, and should the property named in this item fail to do so I will and desire a sufficient amount of money to be added thereto, to affect the quality desired in this item.

Item 5 of said will reads as follows:

5th. I will and desire that each of my younger children draw his or her portion under the 4th item as he or she may become of age.

Item 15 of said will reads as follows:

15th. I will and desire that all the property herein and hereby bequeathed unto my girl children, both of the older and younger set, go to them, and then to their children.

Appraisers were appointed and did set aside to Martha A. Toland, 109 acres of land (the land in question in this case), said proceedings recorded in Will Book 13, pages 477-478 in the Office of the Ordinary of Jasper County, Georgia.

Our contention is that my clients, the children and grandchildren of Martha A. Toland (She later married Sanders and after his death married Bowdoin) own this land in [fol. 105] fee simple by reversion after the death of Martha, (sometime known as Mattie A.). On January 4, 1873 Mattie A. Sanders (same as Martha A. Toland) deeded the 109 acres of land to E. R. Roberts by deed recorded in Deed Book F page 493, Clerk's Office, Jasper Superior Court.

We contend that this deed only conveyed a life estate in said lands and upon the death of the said Mattie A or Martha A. Toland Sanders Bowdoin, then said lands reverted to petitioners in this case and they have been

in constructive [sic] of said land under said title since that time.

From an examination of the title I find that E. R. Roberts on December 12, 1900 deeded R. C. Brown 870 acres, more or less, of land by deed recorded in Deed Book L page 625 of said Clerk's Office. From the description I believe this land includes the land involved in this case. By other conveyances apparently a large tract recited by estimate to be 1837 acres went into Thomas D. Stewart and Mrs. Pearl B. Arnold and these two grantors deeded to United States of America said land on June 6, 1936, deed recorded in Deed Book A-3-540-541 said Clerk's Office, which apparently includes the 109 involved in this suit.

From these facts I conclude that United States of America is also in constructive possession of said 109 acres of land, but its possession is not under a claim of right for the reason that there was no disclaimer and re-entry after the death of Mrs. Martha A. Toland Sanders Bowdoin and the true title is in petitioners in this case referred to. I cite the following Code Section:

George Code, Section 105-1405. DISPUTED POSSESSION; LEGAL TITLE.—Where two persons claim to have actual [fol. 106] possession of the same land, he shall be deemed in possession who has the legal title, and the other is a trespasser.

I will be glad to exhibit my entire file to you gentlemen, or such authority as you designate to see if we can reach some mutual conclusion without the necessity of a trial.

Cordially yours,

/s/ W. B. Mitchell
W. B. MITCHELL

WBM:m

CC: Mr. Buford Malone, Jr.,
Manager,
Interior [sic] Department Lands,
Hillsboro, Georgia.

[fol. 107]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the Middle District of Georgia

OPINION DENYING APPELLEES' PETITION FOR REHEARING BY THE COURT, RIVES, CIRCUIT JUDGE, DISSENTING, FILED: February 23, 1961

On Appellees' Petition for Rehearing and Brief and Supplemental Brief in Support Thereof.

Before RIVES, CAMERON and BROWN, Circuit Judges.

PER CURIAM: Appellee Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, has filed, through attorneys of the Department of Justice of the [fol. 108] United States, a petition for rehearing, together with a brief in support thereof and a supplement to that brief, together with motion for leave to file the supplement. The motion is granted, and the supplemental brief has been considered by the Court.[1]

We reject without discussion the point raised in the supplement to appellee's brief. It brings to our attention certain correspondence between the attorneys for the parties. This correspondence was not before the lower court and is not contained in the record of this appeal. It deals largely with facts which appellee Malone

[1] The United States, which had entered its appearance and joined in Malone's motion to dismiss, has not joined in the petition for rehearing. The judgment entered pursuant to the opinion heretofore rendered in this case approved the judgment of the court below in dismissing the action insofar as the United States was concerned.

claims demonstrate that the present action is barred by limitations. The action was decided by the court below upon the face of the complaint filed by appellants and the motion to dismiss filed by appellee below, along with the United States.[2] That is all which was before the court below and which was involved in this appeal and we decline to consider the matters discussed in the supplemental brief of appellee Malone, as such a possible defense on the part of appellee was not before the court below and is not before us.

We pass over without discussion as having been sufficiently dealt with in our opinion three points made [fol. 109] in the petition for rehearing,[3] and we confine this opinion to a response to the argument presented in Point IV of the petition for rehearing in which it is claimed that "The majority opinion is based upon an erroneous premise as to Georgia law." We do this in part because of the statement in our opinion: "It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that 'the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, . . .'"

That statement in the opinion meant, of course, that the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone. The quoted statement was followed by our statement in the opinion:

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[2] The court below dealt with certain admissions which had been made in pretrial hearings. No question was raised as to whether these were properly before the court on the motion to dismiss, so that we raise no question, but have considered the admissions as included in the written opinion of the court below as being properly before the Court upon the motion to dismiss.

[3] That our opinion I "regresses to the discredited view that whether a suit is against the United States is determined by its presence as a formal party defendant;" and that our opinion II is in conflict with the decisions of the Supreme Court, and III of this circuit and other circuits.

> "The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?"

That is an accurate statement of what was tried before the court below, what was decided by that court, and [fol. 110] what was argued before us in the original presentation of this case. No contention was made that the action of ejectment here involved differed from the action of ejectment dealt with in *United States* v. *Lee*, 1882, 106 U.S. 196, and we made no effort to analyze the statutes and decisions of Georgia to demonstrate that the action of ejectment before the lower court and before us was identical in character and scope with the action involved in *Lee*.

The fact is that Ejectment, as dealt with in Title 33 of the Code of Georgia Annotated, is a comprehensive and flexible remedy. Assuming that, under the Georgia decisions relied upon by appellee in its petition for rehearing[4], the remedy by ejectment has been expanded so as to permit suits to try title to land, there is nothing in any decision we have found which limits the remedy to such a class of actions. Many provisions of the statute reject the thought that the common law action of ejectment, an action at law, has been converted into an exclusively equitable action to quiet title to land, or even to try title.[5]

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[4] Vinson v. Cannon, 1957, 213 Ga. 339, 341, 99 S.E.2d 108, 109;
Lopez v. Downing, 1872, 46 Ga. 120;
Brewster v. Wooldridge, 1897, 100 Ga. 305, 306, 308-311, 28 S.E. 43, 44-45;
Bright v. City of Washington, 1957, 57 G. App. 84, 86, 97 S.E.2d 163, 164, certiorari denied;
Ramey v. O'Byrne, 1904, 121 Ga. 516, 520, 49 S.E. 595, 597; and
Sweat v. Atlantic Coast Line R. Co., 5 Cir., 1936, 81 F.2d 492, 493.

[5] E.G., § 108 of the chapter vests the right to maintain the action in a single joint tenant or other person claiming only a part interest in the lands involved without joining any other

[fol. 111] The opinion rendered by the court below, appearing in the record and now reported in . . . . F. Supp. . . . ., shows that its judgment dismissing the action was predicted upon the petition of appellee Malone alone, stating: "Plaintiff frankly concedes that he cannot maintain this action against the United States itself;" and the decision was rendered in favor of Malone solely on the basis that, in possessing the land, he was acting as agent of the United States, which had not consented to be sued. While the petition for rehearing and the briefs filed in support thereof are somewhat confused, the real contention presented is that the United States was an indispensable party and that the action ought to have been dismissed by the court below on the ground that the suit could not proceed without bringing the United States in.

One of the cases chiefly relied upon to sustain that position is our recent decision in *Stewart* v. *United States*, 1957, 242 F.2d 49. We do not think that appellee's position is sound. *Stewart* involved an action seeking to quiet [fol. 112] title generally against all the world.[6] We held

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person with him, with the proviso that the judgment shall "not affect the rights of those interested in such lands or tenements who are not parties to the suit." § 114 gives the plaintiff the right to make the true claimant defendant and to bind him by the judgment. § 115 confers the right in the plaintiff to make a previous warrantor of title to the land a codefendant. § 120 gives the right to the plaintiff to have a writ of possession against the defendant, including a money judgment for mesne profits. And § 121 denies the right of plaintiff to obtain a writ of possession against third persons "not known in the suit." Implicit in the whole chapter and the decisions under it is the rule that the plaintiff may choose whom he shall sue and his judgment will be binding only upon the person or persons properly brought before the Court.

In one of the cases relied upon by the appellee, Ramey v. O'Bryne, 121 Ga. 516, 49 S.E. 595, 597, the Supreme Court of Georgia refers to ejectment as a mixed action partly for tort, and partly for trial of title. And see also Nottingham v. Elliot, S.Ct. Ga. 1953, 209 Ga. 481, 74 S.E.2d 93.

[6] See 242 F.2d p. 50: "The amended complaint prayed that title to the described mineral interests be quieted in plaintiffs, that all clouds and encumbrances be cancelled, that the condemnation proceedings [by which the United States acquired the title which it passed on, as far as the minerals were concerned, to Placid

that, in such an action, the United States, through whom the others were claiming title, was an indispensable party, basing our holding largely on our prior cases of *Hudson* v. *Newell*, 1949, 172 F.2d 848, and cases cited, and *Mackintosh* v. *Marks' Estate*, 1955, 225 F.2d 211. We stated the general rule concerning indispensable parties to be:[7]

> "It is well settled under the decisions of this Court that no decree can be entered affecting the title to property or cancelling any cloud thereon unless all of the parties interested in the title or in the particular cloud and who will be directly affected by any judgment that may be rendered are properly before the Court."

In *Hudson* v. *Newell* we reversed the action of the lower court in dismissing a suit to quiet title generally to certain lands, as provided by Mississippi statutes using this language:

> "If they can prove the land and oil are theirs we see no reason why shey should not have judgment for them against those sued; possible claimants not in court would not of course be bound by the result. [fol. 113] If such claimants' title is shown as a defense their interests can be saved from the decree. . . .
>
> "We therefore hold that while the full relief prayed cannot be given with only the parties before the court a limited relief can be, and the suits should be retained to enquire into it."[8]

In *Mackintosh*, we cited *Hudson supra*, as authority and held:

> "Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings. . . .

Oil Company and others] be reviewed and corrected, that the oil and gas leases be cancelled and declared void, and that the parties be enjoined from performing them."

[7] 242 F.2d 51.

[8] 172 F.2d pp. 851 and 853.

"The first reason is that the rights of the royalty owners would continue to exist irrespective of the outcome of the present suit. The royalty owners who deraign their title from the appellants are protected under their warranty of title, both express and implied. . . .

". . . The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic. . . .

". . . the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties." 225 F.2d at 214-215.

Certainly, under these decisions, the United States was not an indispensable party here. It had been eliminated in effect by consent. It is difficult to discern what relief [fol. 114] was sought against the United States by the common law complaint in ejectment in the John Doe proceeding. Taking the averments of that complaint, as supplemented by the statement of the court below that plaintiffs (appellants) conceded that the suit against the United States could not be maintained as true, we think it is clear that, under *Lee*, a judgment can be entered by the court below which will grant appellants some relief without adversely affecting the interests of the United States. In fact, this was in effect conceded by the appellee in the original brief.[9]

Several times in the petition for rehearing, the appellee claims that title was put in issue by the denial of appellants' title by appellees. Of course, there was no responsive pleading at all, and the averments of the

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[9] In which this statement appears on page 10: "While the United States would not be bound by a judgment against Malone, its interests in managing the property would be affected and a doubt would be cast upon its title until directly litigated by the United States with the appellants." Such an incidental impact upon the interests of the United States would not make it an indispensable party, and the same contention was directly rejected in Lee.

complaint must be taken as true in passing upon the motion to dismiss.

The petition for rehearing is

DENIED.

RIVES, Circuit Judge: I dissent.

[fol. 115]

• • • •

No. 18222

JAMES A. BOWDOIN, ET AL,

versus

BUFORD MALONE, JR., and UNITED STATES OF AMERICA

ORDER DENYING REHEARING—Feb. 23, 1961

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fols. 116-119] • • • •

[fol. 120] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT OMITTED IN PRINTING

[fol. 121]

SUPREME COURT OF THE UNITED STATES

• • • •

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 617818 329

QUESTION PRESENTED

Whether an action may be maintained to eject a federal officer from lands claimed by the United States, where the officer is sued in his official capacity and is admitted to be acting only within his statutory authority, and there is no claim that he acts unconstitutionally.

STATEMENT

This is an action, in the fictitious form of ejectment, brought in a court of the State of Georgia against Buford Malone, Jr., the petitioner, alleging ouster from certain lands with resulting damages to the respondents (R. 5–6).[1] The petitioner removed the action to the federal district court on the ground that the land involved was part of a national forest and that he was acting only in his official capacity as a Forest Service Officer of the Department of Agriculture (R. 2–4). At a pre-trial conference, the respondents admitted that the petitioner "was acting solely under color of his office as a Forest Service Officer" and that "his official duties * * * required him to be, and he was, in charge and in possession of the land described in" the complaint (R. 20–21). Accepting those concessions, the district court dismissed the action for lack of jurisdiction, holding that it was in substance a suit against the United

[1] The United States was originally made an additional party defendant, but the respondents thereafter conceded that the action could not be maintained against the United States itself (R. 21) and the dismissal of the action against it is not contested.

States for which consent had not been given (R. 20–23). The court of appeals, with one judge dissenting, reversed (pp. 1a–23a, *infra*). A petition for rehearing *en banc* was denied by the same three-judge panel, again with one dissent (pp. 24a–31a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decision of this Court in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. The court of appeals made no attempt to conceal its preference for the dissent in that case, and its opinion can fairly be characterized as an invitation to this Court to reconsider and overrule the *Larson* rationale.

In the *Larson* case, the War Assets Administrator, believing the plaintiff had failed to comply with the terms and conditions of a sale to it of surplus coal, cancelled the sale and proposed to sell the coal to another buyer. The plaintiff, claiming title to the coal, brought an action against the Administrator to enjoin the alleged "conversion" of its coal. This Court held the action to be in substance one against the United States and hence barred by sovereign immunity (p. 695):

> * * * We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts.

But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

Since the administration of sales contracts was within the delegated powers of the Administrator, his action in withholding delivery of the coal on the basis of his interpretation of the contract was "authorized" even if "illegal" as a matter of contract or tort law.

The principles reaffirmed in the *Larson* opinion, after an exhaustive examination of the prior cases, are directly controlling here. There is no claim either that petitioner was acting beyond the scope of his delegated powers or that those powers were unconstitutionally conferred. As the court of appeals recognized, petitioner's "official duties required him to be, and [he] was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States" (p. 3a, *infra*). Being authorized in the agency sense and not unconstitutional, petitioner's actions were, under the *Larson* decision, the actions of the United States and a suit for specific relief against him is a suit against the United States.

The sole attempt of the court of appeals to reconcile its decision with *Larson* v. *Domestic & Foreign Corp.* is based upon this Court's introductory observation that "There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions" (337 U.S. at 686; pp. 18a–19a, *infra*). The present case is different, the court of appeals concludes, because here the claim is that petitioner "is wrongfully and tortiously holding pos-

session of [respondents'] lands as agent for the United States, which does not have the right of such possession" (p. 19a, *infra*). The purported distinction does not exist. In the quoted sentence, this Court was merely separating (a) the question whether a suit, purportedly against an officer, is in effect a suit against the sovereign and (b) the quite different question whether the officer himself, by virtue of his official position, has a personal immunity from suit and from personal liability. It was not, as the court of appeals implies, suggesting that the officers' actions were not claimed to be "wrongful." To the contrary, it was precisely in those terms that the Court itself stated the plaintiff's claim (p. 692):

> * * * If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.

Since the whole of the opinion in the *Larson* case was devoted to answering that very argument, the court of appeals' differentiation of the instant case on the ground that the actions here are claimed to be "wrongful" and "tortious" is unsound.

The court of appeals relied primarily on *United States* v. *Lee*, 106 U.S. 196, and *Land* v. *Dollar*, 330 U.S. 731, and found it "significant * * * that the Supreme Court [in *Larson*] did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases" (p. 19a,

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No. — 113

In the Supreme Court of the United States

OCTOBER TERM, 1960 61

BUFORD MALONE, JR., PETITIONER

v.

JAMES A. BOWDOIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

BUFORD MALONE, JR., PETITIONER

v.

JAMES A. BOWDOIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the district court (R. 20–23) is reported at 186 F. Supp. 407 under the name *Doe* v. *Roe*. The opinions of the court of appeals (App., *infra*, pp. 1a–23a, 24a–31a) are reported at 284 F. 2d 95 and at 287 F. 2d 282.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1960. A timely petition for rehearing *en banc* was denied on February 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

infra). It is true that the Court in the *Larson* opinion merely distinguished, rather than overruled, those cases, but it "distinguished" them in a way which deprived them of whatever applicability they might otherwise have had to the facts of this case.[2] *Lee* was distinguished as involving a taking of property without just compensation—there being at that time no remedy for the recovery of just compensation—and thus an unconstitutional action.[3] 337 U.S. at 696–697. *Dollar* was distinguished on the ground that it was there claimed that the action violated a statutory limitation on the officers' authority. 337 U.S. at 702, note 26. So interpreted, *Lee* and *Dollar* admittedly afford no support for the decision below, and in rejecting that interpretation (expressly as to *Lee*, see pp. 7a–8a, 12a, *infra*) the court of appeals again comes into conflict with the *Larson* ruling.

Not even the court of appeals seems confident of its distinctions of *Larson*, and its underlying view of the matter is evident from its final explanation of that case (pp. 19a–20a, *infra*):

> * * * At all events, whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent [337 U.S. at 713]:

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[2] For purposes of this petition, it is unnecessary to reach the question whether the *Lee* and *Dollar* cases would support the decision below even apart from their limitation by the *Larson* decision.

[3] In this case, if there was a taking of respondents' property, they have a remedy under the Tucker Act, 28 U.S.C. 1346(a), 1491, by which Congress waived immunity and authorized a suit for damages, but not for specific relief.

> "These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case."

This is but a direct challenge to the rationale of the *Larson* opinion, which the court concludes it need not follow because the facts of this case are different. We readily concede that the facts are different, and *Larson* could probably have been decided on grounds having no application to this case. The fact remains, however, that this Court chose to decide it on the broader grounds, relying only on the aspects of that case which are common to this case—namely, the allegation of a tortious withholding of possession of property belonging to the plaintiff. The conclusion that a suit for specific relief from such an alleged wrong is a suit against the sovereign so long as the officer is acting within the scope of his delegated powers was thus the *holding* of the Court, and the decision below is in square conflict with that holding.

2. The decision is also in conflict with rulings of the Sixth and Ninth Circuits in *Andrews* v. *White,* 221 F. 2d 790 (C.A. 6), and *Cavanaugh* v. *Long,* 252 F. 2d 959 (C.A. 9), affirming *Cavanaugh* v. *McKenzie,* 159 F. Supp. 555 (D. Nev.). In the *Andrews* case, an action was brought against Forest Service Officers to enjoin them from trespassing upon land to which the

plaintiffs claimed title.[4] The Sixth Circuit, recognizing that the relief sought would interfere with the administration by the United States of property claimed by it and that the officers were acting within their delegated powers, held that the action was an unconsented suit against the United States, citing *Larson*. In the *Cavanaugh* case, the action was for specific relief against the commanding officer of a military base for obstructing a road over which the plaintiff claimed an easement. There being no claim that the officer was acting beyond his statutory authority, the action was again held to be against the United States under the *Larson* holding.

3. The question in this case is one of evident importance. The United States owns more than 407 million acres of land as part of the public domain or which have been acquired by purchase, condemnation, or otherwise. S. Doc. 100, 84th Cong., 2d Sess., p. 55. Adverse claims are constantly being asserted and the question of sovereign immunity from suits for specific relief is a recurring one. Unlike suits for money damages, suits for specific relief would, as this Court recognized in the *Larson* decision (see 337 U.S. at 703–705), seriously interfere with the execution of important governmental programs. The conflict between the decision below and the decisions of this Court and of the Sixth and Ninth Circuits should be resolved.[5]

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[4] The district court had alternatively construed the complaint as sounding in ejectment, in which form it was equally held to be barred. 121 F. Supp. 570, 573 (E.D. Tenn.).

[5] The decision below has already been relied upon by one district court in denying a motion to dismiss an action against

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

MAY 1961.

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officers of the Army Corps of Engineers, the court observing that "it is sometimes possible to escape the doctrine of sovereign immunity and thereby compel or enjoin governmental action by suing an individual government official." *Miracle* v. *Jacoby, et al.*, W.D. Ark., Civil No. 1574, March 30, 1961 (unreported).

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

(October 25, 1960)

Before RIVES, *Chief Judge,* and CAMERON and BROWN, *Circuit Judges*

CAMERON, *Circuit Judge:* Appellants James A. Bowdoin, et al. filed an action in ejectment in a Georgia state court in the fictitious form of *John Doe* v. *Richard Roe,* as provided by the statutes of Georgia.[1] Personal service was had upon appellee Buford Malone, Jr., by the sheriff of Jasper County, Georgia; service upon the United States was attempted by mailing copies of the petition to the Attorney General of the United States and to the United States Attorney, thus revealing that the "true

[1] Vol. 12, Code of Georgia, Annotated, Title 33, § 111: "*Consent Rule. Fictitious forms in pleading.*—The consent rule in ejectment shall always be considered as filed, and admits lease, entry, and ouster. The fictitious forms in pleading in ejectment shall be sufficient." Cf. *Horn* v. *Towson*, S. Ct. Ga. 1926. 135 S.E. 487.

claimants" were the appellees Buford Malone, Jr., and the United States of America.

The appellees removed the case to the United States District Court, where they moved to dismiss the complaint for failure to state a claim upon which relief could be granted; because the state court did not have jurisdiction over the United States or Malone, and the United States had not consented to be sued or waived its immunity from suit; and because Malone was being sued "as an agent and employee of the United States, and, as to him, the suit is in substance and effect one against the United States; thus the United States is an essential and indispensable party to the suit."[2]

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[2] Neither in the motion nor in appellees' brief is it argued that the petition filed by appellant was in any way insufficient to bring the appellees within the scope and protection of the statutes of Georgia, some of which are quoted here:

12 Code of Georgia Annotated, Title 33, § 102: "*Plaintiff may recover on his prior possession, when.*—A plaintiff in ejectment may recover the premises in dispute, upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever."

Ib. Title 33, § 104: "*Mesne profits, how recovered.*—The plaintiff in ejectment may add a count in his petition, and submit the evidence to the jury, and recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute."

Ib. Title 33, § 114: "*True claimant made defendant; effect of judgment.*—A plaintiff in ejectment may in all cases make the true claimant defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment."

Ib. Title 33, § 120. "*Writ of possession; issuance; contents.*—When a verdict in ejectment shall be rendered in favor of the plaintiff, and a judgment entered thereon, the clerk of the superior court shall issue a writ of possession, in which the clerk shall incorporate a clause directing the sheriff to collect,

The entire argument of both litigants assumes that the uncontroverted averments of the petition of the appellants are sufficient to require answer by the appellee Malone and to a trial, unless the court below properly granted his motion, as well as that of the United States, to dismiss because of want of jurisdiction. Both parties conceded in the trial court and before us that the United States was not legally before the Court and that the action against it should be dismissed. The sole question remaining, therefore, is whether this statutory action in ejectment states a claim against appellee Buford Malone, Jr., Forest Service Officer, United States Department of Agriculture, whose official duties required him to be, and who was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States.

The court below granted Malone's motion to dismiss on the ground "that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not consented to be sued or waived its immunity from suit."[3]

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by levy and sale of the defendant's property, all such sums of money shall have been awarded to such plaintiff in ejectment as mesne profits and costs."

Ib. Title 33, § 121: "*Against whom writ of possession may issue.*—The writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, nor put in possession by, or claiming under or by virtue of any conveyance from the defendant in such suit."

[3] The court's reasons were thus amplified in its written opinion: "This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of *Jones* v. *United States*, 127 F. Supp. 31, 33 (E.D. N.C. 1954):

"'However, in my opinion, *United States* v. *Lee* has been severely limited by Larson [*Larson* v. *Domestic and Foreign*

It is manifest that the court below did not base its decision on what the District Court for the Eastern District of North Carolina *did* in the *Jones* case, but adopted only a portion of what the district court there *said*. The fact is that the *Jones* suit involved, not only ejectment, but partition of lands in which Jones claimed to own a two-thirds interest, which the United States had taken without paying compensation under the Fifth Amendment. It appears from the decision that Dennis, the agent in charge of the tract of land, did not move to dismiss and did not ask summary judgment. Only the United States filed such motions. The final paragraph of *Jones* (127 F. Supp. 33) shows the action taken by the court in that case: "It does not clearly appear that this Court has no jurisdiction to entertain the case in any of its aspects, and the court, therefore, denies both motions of the United States to dismiss as upon summary judgment."

We will not, however, confine this opinion to differentiating the *Jones* case from the case before us, as the argument of appellees is pitched upon the assumption that, if the *Lee* case has not been entirely overruled, "there may be no cases at all in which *United States* v. *Lee* will permit suit today"—as was said in *Jones* and apparently adopted by the court below.

Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628 (1949)], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which *United States* v. *Lee* will permit suit today.'

"The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887. * * *

"Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order."

In comparing the case before us with decisions in other cases which will be discussed, and in determining whether the facts here come within the holding of *United States* v. *Lee*, 1882, 106 U.S. 196—much watered down under the opinion of the court below and the argument of appellee here—we must follow the general rule:[4] "'* * * that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. * * * Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'" This makes it necessary that the salient portions of the petition be set out.[5]

Under this petition and the statutes of Georgia above quoted it is apparent that appellants would be able to prove: That they were, on the crucial dates, the true owners of such title to the lands involved as would support the leasehold interest they sought to

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[4] Stated by us in *Des Isles* v. *Evans, et al.*, 1952, 200 F. 2d 614, 615–616.

[5] "The petition of John Doe [James A. Bowdoin, et al] shows that Richard Roe [Buford Malone, Jr.] has damaged him in the sum of Twenty-five Thousand Dollars: for that on January 1, 1953. James A. Bowdoin [and nine others] demised to your petitioners for the term of 50 years from said date the following lands in said County, to-wit:

"* * * and your petitioner duly entered thereon under said lease and afterwards on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

"Wherefore your petitioner prays that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law."

establish; that the United States did not own any title to the lands which would defeat appellant's claims; that appellee Malone was in wrongful possession of said lands as agent of a principal which did not have any claim thereto, and that he had ousted appellants of their rightful possession; and that, based upon said tortious acts of appellee Malone, appellants are entitled to money damages and the possession of the land during the claimed term of the leasehold."

It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that "the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, * * *" The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

If the *Lee* case is still the law applicable to ejectment suits of this character, it is plain that the complaint before us states a claim upon which relief can be granted, and that the appellee Malone is not protected by any sovereign immunity of the United

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"*Kaufman* v. *Deese*, S. Ct. Ga., 1949, 205 Ga. 841, 55 S.E. 2d 358, and *Vinson* v. *Cannon*, S. Ct. Ga., 1957, 213 Ga. 339, 99 S.E. 2d 108. In the latter decision the general rule is stated, at page 109 of 99 S.E. 2d.

"Needless to say the fictitious forms of pleading in ejectment are still the law in this State, with defendant admitting the lease and entry of the plaintiff and his ouster by the defendant from the lands involved. Code § 33-111; Code Ann. Supp. § 24-3344. * * * The purpose of the action is to eject the defendant from possession of the land involved. * * *"

States which may be present in such circumstances. Indeed neither the court below nor appellee's counsel seem to question this statement. If they did, the *Lee* case would reject their argument entirely, because the fact of the *Lee* case and those of the present case are identical in their legal effect. A comprehensive look at the *Lee* case is indicated.[7]

The Arlington estate of General Robert E. Lee had, during the War Between the States, been seized for nonpayment of taxes. Under the jury's findings these taxes had in fact been tendered by a friend, but the tax collector had interpreted his authority as permitting payment of the taxes only by the record owner. After the United States had seized the lands, it established a fort and cemetery thereon. The plaintiff, in whom title to the land vested if its seizure could not be justified, brought an action of ejectment against the agents of the government in possession of the estate. The trial court overruled the suggestion of the Attorney General of the United States that the trial court was without jurisdiction, based on the ground that the property was in the possession of the United States. The ejectment action was tried to a jury, which found against the government agents, deciding that the attempted proof did not establish title in the Government and that the agents' possession was not, therefore, legally justified. The Supreme Court affirmed, holding that the lower court was competent to decide the issues between the parties without the presence of the United States whose consent to be sued had been withheld.

A close reading of *Lee* reveals that, although some of the language of the opinion referred to taking property without just compensation, its real basis was that the government agents were ordinary tort

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[7] 106 U.S. 196.

feasors, not immunized for their wrongful trespass upon the plaintiff's property by the fact that they claimed to be acting on behalf of the government. It was admitted that Kaufman, Strong, et al. who were actually holding the land were doing so as agents in possession of the property of the United States. A few excerpts from the exhaustive *Lee* opinion will suffice to epitomize its holdings:

> This proposition [that the court can render no judgment for the plaintiff and against the defendants because they hold the property as officers and agents of the United States, and that the property was appropriated to lawful public uses] rests on the principal that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government. * * * [106 U.S. p. 204]
>
> On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit. * * * [ib. pp. 207–208]
>
> Under our system the *people*, * * * are the sovereign. * * * The citizen here knows no persons, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has

established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. * * * [pp. 208–209.]

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. * * * in this case * * *, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States. * * * [Ib. p. 210.]

"* * * The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; * * * This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit * * *" [Ib. p. 213.]

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, * * * [Ib. pp. 215–216.]

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided. * * * [Ib. p. 217.]

It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. * * * [Ib. p. 219.]

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. * * * [Ib. p. 220.]

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, * * * the unsuccessful

party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen. * * * [Ib. p. 221.]

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, * * * the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. *Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.* * * * [Emphasis supplied—Ib. pp. 222.]

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is Affirmed.

From these excerpts it is clear that the *Lee* case went considerably farther than the court below was asked to go in this case. Admitting that the United States was not properly made a party and that it would not be bound by the judgment,—a principle established also by Georgia Statutes in Footnote 2, *supra*—appellants sought, by a proper judicial proceeding, merely to have interlopers put off of their land by an action at law in ejectment. If *Lee* has

any vitality at all, the judgment of the court below must be reversed.

And what of *Lee*? Has it ever been overruled by the Supreme Court? The court below did not so hold and appellee's argument does not directly make such a contention. All the court below said was, quoting from a six year old district court decision, that *Lee* "has been severely limited by Larson, and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which *United States* v. *Lee* will permit suit today." A study of the cases decided both before and after the one the court below quoted from will demonstrate that the latter portion of the quoted statement is entirely without foundation.

Examination of Shepard's United States Citations reveals that the *Lee* case has been cited three hundred ninety-six times. It has appeared in decisions of the Supreme Court fifty-eight times in seven of which it has been "distinguished," and in four "explained." It would seem from this that the editors of Shepard's consider that, in the remaining forty-seven cases, no fault has been found with *Lee*. It should be noted in passing that, where the Supreme Court has "distinguished" the *Lee* case, it has compared it with the case then before the court and has decided that *Lee* was inapplicable, because its facts did not control those of the case under consideration. With respect to the quoted statement of the court below that the possible distinction between *Lee* and *Larson* was that *Lee* was decided in 1882 before the enactment of the Tucker Act in 1887, it should be noted that fifty of the fifty-eight Supreme Court decisions referred to *supra* have been decided since March 3, 1887 and also that this contention was specifically rejected in *Dollar*, *infra*.

Probably the most significant point about this phase of the argument is that nobody has suggested that there is any authoritative holding that the *Lee* case does not now cover ejectment suits just as fully as it did the day of its rendition. The argument that its application has been severely limited has arisen when the principles of *Lee* was sought to be applied to other and often quite different situations, governed by entirely different rules of law. A reading of those cases will reveal also that there have been no clear-cut distinctions between the facts to which *Lee's* principles apply and those to which it does not apply—no blacks and whites, only varying shades of gray.

Mr. Justice Frankfurter, in his dissent in the *Larson* case,* has done a masterful job of analyzing a large number of the cases dealing with the principles of Lee and assigning them to categories and sub-categories in an effort to draw the line as distinctly as varying facts will permit. Starting with the statement (P. 706): "There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict," he asserts that some of the confusion "is doubtless due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. * * * In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a

* 337 U.S. 705–732.

'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts." [Pp. 708-709.] And, as further support of his statement, he cites the speed with which the Eleventh Amendment was passed after the Supreme Court's decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), along with the cases of *New Hampshire* v. *Louisiana,* 108 U.S. 76, 86-88; *Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 396, and *Federal Housing Administration* v. *Burr,* 309 U.S. 242, 245, where the Supreme Court held that the doctrine of sovereign immunity was in disfavor, as well as Borchard's bibliography in 20 A.B.A.J. 747, 748, and the materials in Judge Mack's opinion in *The Pesaro,* 277 F. 473, reversed, 271 U.S. 562. To these might be added the several Acts in which Congress has specifically withdrawn sovereign immunity, such as the Federal Tort Claims Act, 28 U.S.C.A. § 2671, et seq., Federal Old Age, Survivors and Disability Insurance Benefits Act, 42 U.S.C.A. § 405(g), and I.R.C. 1954, § 7422, et seq.

We will not attempt a general discussion of the cases, referring instead to Mr. Justice Frankfurter's dissent *supra* as presenting a fair and exhaustive examination of the leading cases.

The court below cites in its opinion as authority for the judgment rendered, a case from this Court, *Rambo* v. *United States,* 145 F. 2d 670, 671 (1945), certiorari denied, 324 U.S. 848, 89 L. Ed. 1408 (1945). It quotes from that decision this sentence: "The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." It is sufficient to answer that the case before us is not such a case as the court below there described. This is not

a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. This is purely a common law action in ejectment, as recognized and defined by Georgia's statutes, and involves merely a dispute between individuals for possession of the land.

The main reliance of the court below was the *Larson* case, as is the argument of appellees here. Before taking up discussion of that case we ought to consider the decision of the Supreme Court two years earlier in *Land, Chairman, United States Maritime Comm. et al.* v. *Dollar, et al.*, 1947, 330 U.S. 731.

Dollar was a case where members of the United States Maritime Commission had physical control of the property in question, but it was claimed by Dollar that the property was wrongfully withheld. The Supreme Court approved the principle that the trial court had authority to proceed on the merits in order to determine whether the plaintiff's claim that the withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. The court specifically applied the principles of *Lee* as they are reinforced by such cases as *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 1922, 258 U.S. 549; *Goltra* v. *Weeks*, 1926, 271 U.S. 536, and *Ickes* v. *Fox*, 1937, 300 U.S. 82. Mr. Justice Douglas, speaking for an unanimous court (Mr. Justice Black not participating), stated:

> Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee, supra,* has been repeatedly approved. [Eight Supreme Court cases cited.] * * * In *United States* v. *Lee, supra,* record title of the land

was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not res judicata against the United States, page 222, it settled as between the parties the controversy over possession. * * *

We do not trace the principles of *United States* v. *Lee, supra,* in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. * * * It is not an attempt to get specific performance of a contract to deliver property of the United States. * * * It is not a case where the sovereign admittedly had title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. * * *

* * * But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The "essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration. * * * But public officials may become tort feasors by exceeding the limits of their authority. *And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*

It is in the latter category that the pleadings have cast this case. That is to say, if the alle-

> gations of the petition are true, the shares of stock never were the property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against the petitioners, though, as we have said, the judgment would not be res judicata as against the United States * * * *' [Emphasis added.]

In considering *Larson,* let it be understood that the opinion had the unconditional concurrence of only a minority of the Supreme Court, to-wit, Chief Justice Vinson and Justices Black, Reed and Murphy, all of whom, except Justice Black, had concurred in *Dollar.* Mr. Justice Douglas, author of *Dollar,* joined in the opinion only because the case involved the minutiae of the intricate machinery of sales by the world's largest merchant.[10] Mr. Justice Rutledge concurred in the result, while Justices Frankfurter, Jackson and Burton dissented, the dissenting opinion of Justice Frankfurter having been above referred to several times.

The majority opinion in *Larson* is susceptible of being construed as questioning some of the fundamental bases of *Lee.* As Mr. Justice Frankfurter

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[9] 330 U.S. pp. 737–739.

[10] His concurrence states: "I think the principles announced by the Court are the ones which should govern the selling of government property. Less strict application of those principles *would cause intolerable interference with public administration.* To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer *would clog this governmental function with intolerable burdens.* So I have joined the Court's opinion." [Emphasis added.]

points out,[11] to ascribe to *Lee* the effect which some of the language of *Larson* would seem to justify would be to overrule, not only *Lee*, but many other Supreme Court cases, including landmark decisions by Mr. Justice Holmes, *Sloan Shipyards Corp.* v. *United States*, 1922, 258 U.S. 549, 567–568, and Chief Justice Taft, *Goltra* v. *Weeks*, 271 U.S. 536. The dissent quotes from the decision of Mr. Justice Holmes:

> The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred. [337 U.S. pp. 719–720.]

Larson is a suit for injunction and declaratory judgment against the head of the War Assets Administration upon which a restraining order was issued ex parte. The opinion stresses (page 686): "Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action." Injunctive relief was sought against the Administration for wrongs allegedly committed by its subordinate officials. The crucial paragraph in the *Larson* decision, the one which differentiates that case from the one before the Court below and which supports our holding here is this:

> Before answering that question it is perhaps advisable to state clearly what is and what is not involved. *There is not involved any ques-*

[11] 337 U.S. at pp. 718–720 et seq.

> *tion of the immunization of government officers against responsibility for their wrongful actions.* If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. 337 U.S. 686. [Emphasis added.]

The emphasized words describe exactly what is involved in this action. Appellants claim that appellee Malone is wrongfully and tortiously holding possession of their lands as agent for the United States, which does not have the right of such possession. We think that this is a valid and basic differentiation between *Larson* and this case.

We think it is significant also that the Supreme Court did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case. The special concurring opinion of Mr. Justice Douglas helps to clarify the scope and content of the differentiation. The fact that three Justices who, a scant two years before, had concurred in *Dollar*, also concurred in *Larson* carries a strong inference, we think, that they were not subscribing at all to a doctrine which would, in such a basic aspect, cut the ground from under *Dollar* and *Lee*. At all events, whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent: [12]

> These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with

[12] 337 U.S. 713.

critical precision or with due relevance to the circumstances of a particular case.

It is worthy of note also that, since *Larson, Lee* has been cited with approval in the concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General, et al.*, 1951, 341 U.S. 123, 152; and also by him, speaking for an unanimous court,[11] in *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226. *Dollar* has, since *Larson*, been cited with approval in the concurring opinion of Mr. Justice Douglas in *Georgia Railroad and Banking Co.* v. *Redwine, etc.*, 1952, 342 U.S. 299, 307. Neither *Lee* nor *Dollar* has been questioned by the Supreme Court in any subsequent opinion, as far as our search has revealed.

Larson has been quoted in the opinion of the Court by Mr. Justice Burton in *Anti-Fascist Committee* v. *McGrath, supra*, at page 140 as follows: "The respondents are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual * * * if it is not within the officer's statutory powers or, if within those powers * * * if the powers, or their exercise in the particular case, are constitutionally void.'"

Mr. Justice Frankfurter, dissenting in *Snyder* v. *Buck, Paymaster*, 1950, 340 U.S. 15, 29, cited his dissent in *Larson* and added further remarks con-

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[11] Mr. Justice Douglas dissented in part, 352 U.S. 220, but he concurred in the portion of the opinion in respect to which *Lee* was cited.

cerning the increasing disrepute of the doctrine of sovereign immunity.[14]

In summary, it is clear that, however broad the apparent sweep of the limitations placed upon *Lee* by some of the courts may be, the Supreme Court has never questioned its controlling validity in possessory actions like ejectment, seeking to oust the government's agents from wrongful possession growing out of their tortious or illegal acts. That is all this case involves. The unanimity with which the principles here approved have been upheld springs, doubtless, from the conviction that the implied immunity of the government itself should be extended to its agents only with great caution; and from the realization that the government, in such a suit as this, has the simple option of filing a counterclaim aimed at quieting its challenged title or of raising the same issues in an independent proceeding.

We hold that the action against appellee Malone is not foreclosed because he possesses the land as agent

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[14] "In scores of cases this Court has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381, 390–392. If astuteness has been exercised to deny the representative character of an official in order to avoid his identification as the sovereign *ad hoc*, it runs counter to the rational administration of justice not to find an official the sovereign *ad hoc* and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby."

for the government; and the judgment of the court below is reversed and the case is remanded for further and not inconsistent proceeding.

Reversed and Remanded.

RIVES, *Chief Judge,* Dissenting:

The district court's clear and able opinion reported in * * * F. Supp. * * * shows that "* * * counsel for the plaintiff admitted at the pre-trial conference today that the above quoted paragraphs 2 and 3 of the removal petition are true and correct."[1] From that admission, the district court correctly concluded: "It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign."[2] The appellants make no denial of any of these admis-

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[1] Those paragraphs read as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr., was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

[2] Later in the opinion, the district court said:

"Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U.S. 682, 690. Not only is there no such allegation, but *there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.*" [Emphasis supplied.]

sions of fact upon which the district court's opinion and judgment were based.

Malone might not be immunized from personal liability in damages, but a writ to oust Malone from the possession which he holds solely on behalf of the United States would interfere with governmental functions. It seems to me that the full discussion in *Larson* v. *Domestic and Foreign Corp.*, 1949, 337 U.S. 682, demonstrates that this action was properly dismissed as a suit against the United States to which it had not consented. See also, *Georgia R. Co.* v. *Redwine*, 1952, 342 U.S. 299, 304; *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226; *Stewart* v. *United States*, 5 Cir., 1957, 242 F. 2d 49, 51; Hart and Wechsler, The Federal Courts and the Federal System, pp. 1169–1180. I respectfully dissent.

'A' true copy.

Test:

[SEAL] EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana.

MAY 15, 1961.

Judgment

Extract From the Minutes of October 25, 1960

No. 18222

JAMES A. BOWDOIN, ET AL.

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

"RIVES, *Chief Judge*, Dissenting."

In the United States Court of Appeals for the Fifth Circuit

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

February 23, 1961

On appellees' petition for rehearing and brief and supplemental brief in support thereof

Before RIVES, CAMERON and BROWN, *Circuit Judges*

PER CURIAM: Appellee Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, has filed, through attorneys of the Department of Justice of the United States, a petition for rehearing, together with a brief in support thereof and a supplement to that brief, together with motion for leave to file the supplement. The motion is granted, and the supplemental brief has been considered by the Court.[1]

[1] The United States, which had entered its appearance and joined in Malone's motion to dismiss, has not joined in the petition for rehearing. The judgment entered pursuant to the

We reject without discussion the point raised in the supplement to appellee's brief. It brings to our attention certain correspondence between the attorneys for the parties.[1] This correspondence was not before the lower court and is not contained in the record of this appeal. It deals largely with facts which appellee Malone claims demonstrate that the present action is barred by limitations. The action was decided by the court below upon the face of the complaint filed by appellants and the motion to dismiss filed by appellee below, along with the United States.[2] That is all which was before the court below and which was involved in this appeal and we decline to consider the matters discussed in the supplemental brief of appellee Malone, as such a possible defense on the part of appellee was not before the court below and is not before us.

We pass over without discussion as having been sufficiently dealt with in our opinion three points made in the petition for rehearing,[3] and we confine this opinion to a response to the argument presented in Point IV of the petition for rehearing in which it is claimed that "The majority opinion is based upon

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opinion heretofore rendered in this case approved the judgment of the court below in dismissing the action insofar as the United States was concerned.

[2] The court below dealt with certain admissions which had been made in pretrial hearings. No question was raised as to whether these were properly before the court on the motion to dismiss, so that we raise no question, but have considered the admissions as included in the written opinion of the court below as being properly before the Court upon the motion to dismiss.

[3] That our opinion I 'regresses to the discredited view that whether a suit is against the United States is determined by its presence as a formal party defendant;" and that our opinion II is in conflict with the decisions of the Supreme Court, and III of this circuit and other circuits.

an erroneous premise as to Georgia law." We do this in part because of the statement in our opinion: "It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that 'the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, * * *' "

That statement in the opinion meant, of course, that the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone. The quoted statement was followed by our statement in the opinion:

> The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

That is an accurate statement of what was tried before the court below, what was decided by that court, and what was argued before us in the original presentation of this case. No contention was made that the action of ejectment here involved differed from the action of ejectment dealt with in *United States* v. *Lee,* 1882, 106 U.S. 196, and we made no effort to analyze the statutes and decisions of Georgia to demonstrate that the action of ejectment before the lower court and before us was identical in character and scope with the action involved in *Lee.*

The fact is that Ejectment, as dealt with in Title 33 of the Code of Georgia Annotated, is a comprehensive and flexible remedy. Assuming that, under the Georgia decisions relied upon by appellee in its peti-

tion for rehearing,[4] the remedy by ejectment has been expanded so as to permit suits to try title to land, there is nothing in any decision we have found which limits the remedy to such a class of actions. Many provisions of the statute reject the thought that the common law action of ejectment, an action at law, has been converted into an exclusively equitable action to quiet title to land, or even to try title.[5]

The opinion rendered by the court below, appearing in the record and now reported in * * * F. Supp. * * *, shows that its judgment dismissing the

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[4] *Vinson* v. *Cannon*, 1957, 213 Ga. 339, 341, 99 S.E. 2d 108, 109; *Lopez* v. *Downing*, 1872, 46 Ga. 120; *Brewster* v. *Wooldridge*, 1897, 100 Ga. 305, 306, 308–311, 28 S.E. 43, 44–45; *Bright* v. *City of Washington*, 1957, 57 G. App. 84, 86, 97 S.E. 2d 163, 164, certiorari denied; *Ramey* v. *O'Byrne*, 1904, 121 Ga. 516, 520, 49 S.E. 595, 597; and *Sweat* v. *Atlantic Coast Line R. Co.*, 5 Cir., 1936, 81 F. 2d 492, 493.

[5] E.G., § 103 of the chapter vests the right to maintain the action in a single joint tenant or other person claiming only a part interest in the lands involved without joining any other person with him, with the proviso that the judgment shall "not affect the rights of those interested in such lands or tenements who are not parties to the suit." § 114 gives the plaintiff the right to make the true claimant defendant and to bind him by the judgment. § 115 confers the right in the plaintiff to make a previous warrantor of title to the land a codefendant. § 120 gives the right to the plaintiff to have a writ of possession against the defendant, including a money judgment for mesne profits. And § 121 denies the right of plaintiff to obtain a writ of possession against third persons "not known in the suit." Implicit in the whole chapter and the decisions under it is the rule that the plaintiff may choose whom he shall sue and his judgment will be binding only upon the person or persons properly brought before the court.

In one of the cases relied upon by the appellee, *Ramey* v. *O'Bryne*, 121 Ga. 516, 49 S.E. 595, 597, the Supreme Court of Georgia refers to ejectment as a mixed action partly for tort, and partly for trial of title. And see also *Nottingham* v. *Elliot*, S. Ct. Ga. 1953, 209 Ga. 481, 74 S.E. 2d 93.

action was predicted upon the petition of appellee Malone alone, stating: "Plaintiff frankly concedes that he cannot maintain this action against the United States itself;" and the decision was rendered in favor of Malone solely on the basis that, in possessing the land, he was acting as agent of the United States, which had not consented to be sued. While the petition for rehearing and the briefs filed in support thereof are somewhat confused, the real contention presented is that the United States was an indispensable party and that the action ought to have been dismissed by the court below on the ground that the suit could not proceed without bringing the United States in.

One of the cases chiefly relied upon to sustain that position is our recent decision in *Stewart* v. *United States,* 1957, 242 F. 2d 49. We do not think that appellee's position is sound. *Stewart* involved an action seeking to quiet title generally against all the world.[6] We held that, in such an action, the United States, through whom the others were claiming title, was an indispensable party, basing our holding largely on our prior cases of *Hudson* v. *Newell,* 1949, 172 F. 2d 848, and cases cited, and *Mackintosh* v. *Marks' Estate,* 1955, 225 F. 2d 211. We stated the general rule concerning indispensable parties to be:[7]

> It is well settled under the decisions of this Court that no decree can be entered affecting

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[6] See 242 F. 2d p. 50: "The amended complaint prayed that title to the described mineral interests be quieted in plaintiffs, that all clouds and encumbrances be cancelled, that the condemnation proceedings [by which the United States acquired the title which it passed on, as far as the minerals were concerned, to Placid Oil Company and others] be reviewed and corrected, that the oil and gas leases be cancelled and declared void, and that the parties be enjoined from performing them."

[7] 242 F. 2d 51.

> the title to property or cancelling any cloud thereon unless all of the parties interested in the title or in the particular cloud and who will be directly affected by any judgment that may be rendered are properly before the Court.

In *Hudson* v. *Newell* we reversed the action of the lower court in dismissing a suit to quiet title generally to certain lands, as provided by Mississippi statutes using this language:

> If they can prove the land and oil are theirs we see no reason why they should not have judgment for them against those sued; possible claimants not in court would not of course be bound by the result. If such claimants' title is shown as a defense their interests can be saved from the decree. * * *
>
> We therefore hold that while the full relief prayed cannot be given with only the parties before the court a limited relief can be, and the suits should be retained to enquire into it.[6]

In *Mackintosh,* we cited *Hudson, supra,* as authority and held:

> Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings. * * *
>
> The first reason is that the rights of the royalty owners would continue to exist irrespective of the outcome of the present suit. The royalty owners who deraign their title from the appellants are protected under their warranty of title, both express and implied. * * *
>
> * * * The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic. * * *

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[6] 172 F. 2d pp. 851 and 853.

> * * * the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties. 225 F. 2d at 214–215.

Certainly, under these decisions, the United States was not an indispensable party here. It had been eliminated in effect by consent. It is difficult to discern what relief was sought against the United States by the common law complaint in ejectment in the John Doe proceeding. Taking the averments of that complaint, as supplemented by the statement of the court below that plaintiffs (appellants) conceded that the suit against the United States could not be maintained as true, we think it is clear that, under *Lee,* a judgment can be entered by the court below which will grant appellants some relief without adversely affecting the interests of the United States. In fact, this was in effect conceded by the appellee in the original brief.*

At several times in the petition for rehearing, the appellee claims that title was put in issue by the denial of appellants' title by appellees. Of course, there was no responsive pleading at all, and the averments of the complaint must be taken as true in passing upon the motion to dismiss.

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*In which this statement appears on page 10: "While the United States would not be bound by a judgment against Malone, its interests in managing the property would be affected and a doubt would be cast upon its title until directly litigated by the United States with the appellants." Such an incidental impact upon the interests of the United States would not make it an indispensable party, and the same contention was directly rejected in Lee.

The petition for rehearing is denied.
RIVES, *Circuit Judge:* I dissent.
A true copy.
Test:
[SEAL] EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana.
MAY 15, 1961.

Order denying rehearing

Extract From the Minutes of February 23, 1961

No. 18222

JAMES A. BOWDOIN, ET AL.

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * * *

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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1961

BUFORD MALONE, JR., PETITIONER

v.

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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No. 113

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court's opinion (R. 16–18) is reported at 186 F. Supp. 407 under the name *Doe* v. *Roe*. The opinions of the court of appeals (R. 21–40, 52–58) are reported at 284 F. 2d 95 and at 287 F. 2d 282.

JURISDICTION

The judgment of the court of appeals (R. 41) was entered on October 25, 1960. A timely petition for rehearing *en banc* (R. 42, 44) was denied on February 23, 1961 (R. 58). The petition for a writ of certiorari was filed on May 23, 1961, and was granted on October 9, 1961 (R. 59). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action may be maintained to eject a federal officer from lands claimed by the United States, where the officer is sued in his official capacity and is admitted to be acting only within his statutory authority, and there is no claim that he acts unconstitutionally.

STATEMENT

This is a suit by private parties to eject a federal forester from lands occupied by the United States under claim of title and administered on behalf of the United States by the Forest Service. The plaintiffs, respondents here, assert that there was a defect in the title when the United States acquired the land many years ago (in 1936), that they are the rightful owners, and that therefore they are entitled to eject the federal forester and occupy the land.

The proceeding was instituted by the respondents on May 7, 1959, in the Superior Court of Jasper County, Georgia, against the United States and petitioner, Buford Malone, Jr., (a Forest Service officer) (R. 3). The complaint—in terms of the fictitious form of ejectment known to the common law—asserted that Richard Roe (the petitioner and the United States) damaged John Doe (the respondents) in the sum of $25,000, in that on January 1, 1953, the respondents leased approximately 109 acres of land to themselves for a term of 50 years; that John Doe entered upon the land under the lease; and that "on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner [the respondents here] from said lands and the possession thereof" (R. 3–4).

The complaint described the land claimed in general terms and concluded with a prayer "that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law" (R. 4). Process and service were directed to the petitioner and the United States (R. 2, 5, 6).

The petitioner and the United States then filed a petition for removal of the action from the state court to the District Court of the United States for the Middle District of Georgia, Macon Division, under the provisions of 28 U.S.C. 1442 (R. 1). The removal petition averred that the lands involved were acquired by the United States by deed on June 6, 1936; that the petitioner is a Forest Service Officer of the United States Department of Agriculture; that the petitioner's "official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit"; and that at all times mentioned, the petitioner "was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office" (R. 1-2).

In the federal court, the petitioner and the United States filed motions to dismiss (R. 9) and for a more definite statement (R. 10). In the motion to dismiss, it was contended that (1) the complaint failed to state a claim against the defendants upon which relief could be granted; (2) the state court did not have

jurisdiction over the defendants, since the proceeding was in substance and effect against the United States; and (3) the "United States has not consented to be sued or waived its immunity from suit and the complaint affirmatively shows that Buford Malone, Jr., is being sued as an agent and employee of the United States and as to him the suit is in substance and effect one against the United States; thus, the United States is an essential and indispensable party to the suit" (R. 9).

In their motion for a more definite statement, the defendants asserted that the respondents' complaint and claim were based on title and ownership of realty (but not present possession) and that the respondents claimed the right to possession of realty, while at the same time acknowledging the government's present possession and its denial of the respondents' right to possession (R. 10). The defendants also maintained that they should be furnished a full, accurate and detailed description of the claimed real estate, because the respondents' general description was so vague and ambiguous as to preclude responsive pleadings (R. 10–11, 12).[1] The government asserted that, under

[1] The motion explained that the United States owns several thousand acres of land within the boundaries of the respondents' general description in their complaint and that the defendants had no way of knowing the specific real estate claimed by the respondents (R. 11). The necessity for a more detailed description was elaborated by an allegation that the United States has made many valuable improvements on some of the land included in the boundaries of the respondents' general description and that the respondents failed to show whether some or all of the improvements had been made on property

Georgia law, by merely filing an answer it would admit possession, lease, entry, and ouster, but that it did not know whether it was in possession of all the land generally described by respondents (R. 11). To require the government to survey all of the generally described land in order to defend this suit was said to be expensive, unreasonable, and time-consuming, and would delay a prompt disposition of the case (R. 11–12).

The respondents amended their complaint by filing a plat (R. 14–15), but the government continued in its view that the description was insufficient. At the pre-trial conference, the parties agreed to delay trial and to extend the time for answering until after the question of the court's jurisdiction over this suit was decided. The respondents agreed to supply an adequate description if the district court determined it had jurisdiction.

After consideration of arguments and briefs on the question of jurisdiction—raised by the defendants' motion to dismiss—the district court granted that motion (R. 18). The court's opinion recited the government's contentions that the petitioner was at all times a Forest Service Officer, that his official duties required him to be in charge and in possession of the land described in the ejectment suit, that at all times the petitioner was acting solely under color of his office, and that all of the petitioner's acts in connection

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claimed by the respondents (R. 11). A deprivation of the government's right of set-off was feared if the government was not fully advised of the specific realty claimed by the respondents (R. 11).

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with the matters charged in the complaint were committed by the petitioner under color of his office (R. 16). The court then noted that, while the complaint "does not affirmatively show that Malone is being sued as an agent and employee of the United States, counsel for the plaintiff admitted at the pre-trial conference today that the above-quoted paragraphs 2 and 3 of the removal petition [R. 1–2] are true and correct. It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign" (R. 17). The opinion emphasized that the respondents failed to allege that the petitioner was acting beyond a statutory limitation upon his authority and that they affirmatively admitted that his official duties required him to be in charge and possession of the land involved (R. 17).

The respondents appealed. In their brief on appeal they referred to the chain of title through which they claimed the land: An 1857 will devised a life estate in certain land to Martha A. Sanders (*nee* Toland), with remainder over to her children (R. 44–45, 49–51). The respondents were said to be her children and grandchildren (R. 45, 50). In 1873, the devisee (Mrs. Sanders) conveyed the land, evidently in fee, to mesne grantors of the United States (R. 45, 50–51) which acquired the land in 1936 (R. 51). Mrs. Sanders died in 1928. The respondents were not said ever to have been in actual possession of the land (R. 45, 50–51).

The court of appeals, with Judge Rives dissenting, reversed the judgment of the district court (R.

41), the majority holding that the action could be maintained against the petitioner (R. 21–40). The court held that under the complaint and relevant Georgia statutes the respondents would be able to prove that (1) they were the true owners of the title; (2) the United States did not own any title which would defeat the respondents' claim; (3) the petitioner was in wrongful possession as agent of a principal (the United States) which did not have any claim thereto; (4) the petitioner ousted the respondents from their rightful possession; and (5) the respondents are entitled to money damages and possession during the claimed term of the lease-hold (R. 25). The opinion stated (R. 33):

> This is not a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. * * *

It was also said that "the common law action of ejectment in Georgia involves possession alone" and that the only relief recoverable is possession and damages, although the writ of possession would not operate against third persons not joined in the suit (R. 25).

Judge Rives dissented for the reasons that, under the respondents' admissions recited in the district court's opinion, ousting the petitioner from possession would interfere with governmental functions; and that, under *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, the action was properly dismissed as

a suit against the United States to which it had not consented (R. 39–40).

A petition for rehearing *en banc* was denied by the majority of the same panel (R. 58). In denying the petition for rehearing *en banc,* the court declared that damages are not recoverable in this action against the federal officer and that possession alone is involved (R. 53).

SUMMARY OF ARGUMENT

I

This suit is in substance against the United States, which has not consented to be sued. The proceeding must therefore be dismissed as beyond the jurisdiction of the district court.

A. The action is one to oust petitioner, a United States Forest Service Officer, acting in his official capacity, from certain land. The land he occupies is part of a national forest acquired by the federal Government by purchase in 1936 and held since that time. There is no claim that petitioner acts in excess of his statutory authority or unconstitutionally. Instead, respondents admit that he acts solely in accordance with his delegated powers and, hence, that his action is "authorized" in the agency sense. The only contention is that the respondents, who have never possessed the land, are entitled to it under an old claim. In such circumstances the suit is clearly one against the United States and cannot be maintained without its consent, under the principles reaffirmed in *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682.

The reliance of the respondents and the court of appeals on *United States* v. *Lee,* 106 U.S. 196, and *Land* v. *Dollar,* 330 U.S. 731, is misplaced. Those cases were urged upon and discussed by the Court in *Larson* and found distinguishable. The *Lee* case, decided in 1882 when there was no provision for the recovery of just compensation for the taking of property, was held to involve an unconstitutional taking. *Dollar* was rested on the allegation in that case that the federal officers were acting in excess of their statutory authority. In contrast, there is here an admission that the petitioner is acting solely within his properly delegated powers.

B. Dismissal is also proper because this is an unconsented suit to try the title of the United States to property which it claims and possesses. Both its title and possession are involved in this ejectment action which under Georgia law was clearly a suit to try title (as well as the right to possession). The established principle is that a suit in name against a federal officer, involving the possession and title of property claimed by the United States, is a suit against the sovereign.

II

A. It is not unjust to apply the doctrine of sovereign immunity to this class of case. The judgment sought will expend itself upon, and will interfere with the efficient administration of, the public domain. As recognized in the *Larson* case, *supra,* specific relief—here, ouster of the government from land occupied for federal purposes since 1936 under deed—is a direct interference with governmental activity; Congress has

rarely countenanced such direct interference when it has consented to suit.

B. A significant factor is that the prohibition of this type of suit will not leave the claimant unprotected. Congress has provided in the Tucker and Tort Claims Acts means by which many such claimants can be made whole through the recovery of compensatory damages. It is important, however, to recognize that where Congress has removed the immunity bar it has been in the form of suits against the United States directly and the relief authorized has been money damages only—not specific relief. And in giving consent to suit Congress can impose conditions and limitations which may be required to protect the public interest—restrictions which cannot be easily imposed when suit is permitted as a result of judicial action.

ARGUMENT

Respondents' action is a suit to oust petitioner, a Forest Service Officer, from land which the federal Government has held and occupied since 1936, under claim of full title, as an integral part of the federal domain. There is no challenge to the petitioner's statutory or constitutional authority to occupy the land on behalf of the United States, nor is there any claim that the land was acquired unconstitutionally. Respondents have never been in possession. This, like a private action for ejectment, is solely a dispute over chain of title: the respondents assert that their ancestor had no authority to dispose of the land in fee, while the United States answers that it has acquired good title impervious to this attack.

The government's plea to turn the respondents out of court for bringing an unconsented suit against the United States may, to some eyes, seem harsh and outmoded. But that defense has been maintained because we believe it to be imbedded in the Constitution, warranted by the historically accepted rules and doctrines of sovereign immunity, sustained in this instance by the demands of the public interest, and confirmed by the traditional congressional attitude toward the immunity bar. This is in essence a proceeding to eject the federal government from possession of land which it holds under a claim of title, for the United States can only occupy the property for public purposes through an officer such as petitioner. Judicial compulsion to oust the federal officer in these circumstances has consistently been denied by this Court. And when Congress has permitted suits against the United States for demands arising out of government action concerning realty, as in the Tucker Act and the Federal Tort Claims Act, Congress has carefully limited its consent to actions for money damages recoverable against the United States. In the field of government real property relations, it is important, in our view, that the bar of immunity be lifted no farther than Congress has expressly authorized or the Court has traditionally allowed. The private claimant is not left unprotected. Many, if not all, such claimants have a remedy under the Tucker Act or the Federal Tort Claims Act for compensatory damages.

5. Our view of the *Larson* case has been upheld by two other courts of appeals in comparable factual situations. In *Andrews* v. *White,* 221 F.2d 790 (C.A. 6), affirming 121 F.Supp. 570 (E.D. Tenn.), as in this case, the action was removed from a state court, specific relief was sought against United States Forest Service Officers to enjoin them from alleged trespasses upon land to which the plaintiffs claimed title,[1] the United States was not a party defendant, and the record disclosed that the federal officers acted solely within their statutory authority. The district court dismissed. Recognizing that the relief prayed for would operate against the United States in the administration of public lands and that the federal officers were exercising powers delegated to them by the United States, the Sixth Circuit affirmed the dismissal summarily, citing *Larson.*

The other case is *Cavanaugh* v. *Long,* 252 F.2d 959 (C.A. 9), affirming *Cavanaugh* v. *McKenzie,* 159 F.

(N.D. Cal.), affirmed *sub nom. Dollar* v. *United States,* 190 F.2d 547 (C.A. 9), certiorari denied, 342 U.S. 910; *United States* v. *Dollar,* 100 F.Supp. 881 (N.D. Cal.), injunction granted to preserve status quo pending appeal, 193 F.2d 114 (C.A. 9), reversed and remanded, 196 F.2d 551 (C.A. 9); application for stay of order to show cause in contempt denied, 341 U.S. 912; *Land* v. *Dollar, Sawyer* v. *Dollar,* and *In re Killion,* 190 F.2d 366 and 190 F.2d 623 (C.A. D.C.), certiorari granted and vacation of stay of contempt order denied, 341 U.S. 737–738, 342 U.S. 875, dismissed on motions, 344 U.S. 806.

[1] The district court there construed the action as one in ejectment or for injunctive relief. Construed as an action in ejectment, regarded in Tennessee as a suit to try title and right to possession, the action was held prohibited. 121 F.Supp. at 573 (E.D. Tenn.). As will be shown, *infra,* pp. 29–33, ejectment in Georgia is regarded the same way.

Supp. 555 (D. Nev.). The suit was removed from a state court and was for specific relief against the commanding officer of a military base. The plaintiff complained that the federal officer had obstructed a base road which the plaintiff had formerly used to reach his property. An easement was claimed. There was no allegation that the officer acted unconstitutionally or beyond his statutory authority or that the officer was not acting for the sovereign. It was plain that the officer had no personal interest in the asserted easement. The district court recognized and applied the principles urged by the petitioner here, in determining that the suit nominally against the officer was actually against the federal government in that the specific relief sought would take effect upon the public property. In affirming the dismissal *per curiam*, the Ninth Circuit adopted the district court's reasoning that the *Larson* case "culminate[s] all prior legal thinking on the subject of Governmental immunity * * *." 159 F.Supp. at 559. The district court concluded (at 560) that the specific relief "must, of necessity, expend itself on the public domain." That is the case here, and the judgment which the court of appeals authorizes will have that prohibited effect.

B. THE UNITED STATES IS AN INDISPENSABLE PARTY SINCE THE ACTION IS ONE TO TRY TITLE TO, AND RIGHT TO POSSESSION OF, PROPERTY TO WHICH THE UNITED STATES ASSERTS FULL CLAIM

An alternative way to view this action is as one to try the title and right to possession of property which the United States possesses and claims as its

I

THE ACTION SHOULD BE DISMISSED AS A SUIT AGAINST THE UNITED STATES TO WHICH IT HAS NOT CONSENTED

As the case came to ruling in the district court, that court properly dismissed the action, under the decisions of this Court, as an unconsented suit against the United States.

The basis of the respondents' claim does not appear upon the face of the complaint itself only because the complaint follows the fictitious form of ejectment pleading (R. 3). The question of the district court's jurisdiction, raised by the motion to dismiss (R. 9), enabled the court to inquire into the facts, as they actually exist, by reference to the process served (R. 5), the notice to the real defendants (R. 6), the removal petition (R. 1), and the respondents' pre-trial admissions (R. 16–17). See *Land* v. *Dollar*, 330 U.S. 731, 735, note 4, and authorities there cited. The district court was permitted to consider, without formal answer, the government's plea of its direct interest as bearing on the court's jurisdiction. The court of appeals therefore erred in concluding (R. 24, 57–58) that "the averments of the complaint must be taken as true in passing upon the motion to dismiss." The district court granted the motion to dismiss, not for failure to state a cause of action—to which the principle cited by the court below applies—but for a lack of jurisdiction appearing in the case at that juncture (R. 16–18). Moreover, the respondents concede that the action may not be maintained in name against the United States (R. 17) and the

court of appeals approved the district court's judgment dismissing the action insofar as the United States was concerned (R. 52, note 1). In determining whether the suit is against the sovereign, it is immaterial that the action has been dismissed as to the United States and that the United States is not now a formal party defendant.[2]

A. LARSON V. DOMESTIC & FOREIGN CORP. IS CONTROLLING

1. In the *Larson* case, 337 U.S. 682, the War Assets Administrator, believing the plaintiff-buyer had failed to comply with the terms and conditions of surplus coal, cancelled the agreement and proposed to sell the coal to another buyer. The plaintiff, claiming title to the coal, brought an action against the Administrator to enjoin the alleged "conversion" of its coal. This Court held the action to be in substance

[2] *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296; *Ex parte State of New York, No. 1*, 256 U.S. 490, 500; *Louisiana* v. *McAdoo*, 234 U.S. 627, 629; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68–69; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; *Belknap* v. *Schild*, 161 U.S. 10, 25; *In re Ayers*, 123 U.S. 443, 487–492; *Hagood* v. *Southern*, 117 U.S. 52, 67; *Poindexter* v. *Greenhow*, 114 U.S. 270, 287. Whether a suit nominally directed against a federal officer is a suit against the United States is determined by the effect of the judgment or decree to be entered. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687; *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296; *Louisiana* v. *McAdoo*, 234 U.S. 627; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386. (At least to the extent *United States* v. *Lee*, 106 U.S. 196, 207, suggested in 1882 that the proposition that the United States may not be sued directly may be "limited to cases in which the United States are made defendants by name," the *Lee* case has since been overruled.)

one against the United States and hence barred by sovereign immunity (337 U.S. at 695):

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

Since the administration of sales contracts was within the delegated powers of the Administrator, his action in withholding delivery of the coal on the basis of his interpretation of the contract was "authorized", even if "illegal" as a matter of contract or tort law.[2]

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[2] It does not follow, however, that a suit against the sovereign may always be maintained through the expedient of suing the officer and alleging that he acts without proper authority. See *Larson*, 337 U.S. at 691, fn. 11. In the following decisions, the Court held the suit to be against the sovereign although it was alleged that the officer's conduct was without authority in the Constitution or in statute. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 374–375; *Morrison* v. *Work*, 266 U.S. 481, 484–486; *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Lankford* v. *Platte Iron Works*, 235 U.S. 461, 476; *Louisiana* v. *McAdoo*, 234 U.S. 627, 632–634; *Goldberg* v. *Daniels*, 231 U.S. 218, 221–222; *Louisiana* v. *Garfield*, 211 U.S. 70, 74, 77–78; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475; *Oregon* v. *Hitchcock*, 202 U.S. 60, 62–63, 69–70; *Hagood* v. *Southern*, 117 U.S. 52, 67–68; *Louisiana* v. *Jumel*, 107 U.S. 711, 720–723.

In deciding that the *Larson* case was a suit against the United States, the Court also discussed the criteria by which the determination could be made in suits for specific relief, expressly mentioning ejectment (337 U.S. at 687–688):

> it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions, that question is easily answered. The judgment sought will not require action by the sovereign or *disturb the sovereign's property.* There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: *i.e.,* the recovery of specific property or monies, *ejectment from land,* or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained * * * [This question] arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem,* of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against

> the individual officer. If it is, then the suit is barred not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. [Emphasis added.]

The *Larson* opinion does not foreclose all suits for specific relief against federal officers, employees, or agents. The Court explained that suits against such officers, based on their individual or personal action, were outside the prohibited area. 337 U.S. at 689. Also, where the officer acts beyond a statutory limitation, the officer is vulnerable to a suit for specific relief—if the plaintiff specifies the statutory limitation upon which he relies. The Court emphasized that "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." 337 U.S. at 690. Further, where the claim is made that a statute or order under which the officer has acted is claimed to be unconstitutional, a suit for specific relief may be maintained. 337 U.S. at 690. However, if the federal officer's action is "authorized" in the agency sense, the suit is barred. 337 U.S. at 695. The Court made this clear when it stated (337 U.S. at 693):

> In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. But, in a suit against an agency of the sovereign, it is not sufficient that

> he make such a claim. *Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign.* The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. *If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.* [Emphasis added.]

2. The principles reaffirmed in the *Larson* opinion, after an exhaustive examination of the prior cases, are directly controlling here. In the present case, as in *Larson,* no question of the immunization of government officers against responsibility for their wrongful individual actions is presented. The compulsion which the Court is asked to impose is compulsion against the sovereign, although nominally directed against the petitioner. The judgment sought will "disturb the sovereign's property" which has been in its possession since 1936. The suit is not one for money damages but for specific relief, *i.e.,* ouster of the government and of the government official. There is no claim either that the petitioner was acting beyond the scope of his delegated powers or that those duties were unconstitutionally conferred. As the district court and the court of appeals recognized below, the petitioner's "official duties required him to be, and * * * [he] was in fact, in charge and possession

of the land described in the ejectment action under color of his office representing the United States" (R. 16–17, 23). On the basis of these considerations, the suit was barred in the *Larson* case because it was, in substance, a suit against the United States over which the district court, in the absence of consent, had no jurisdiction. The same conclusion should be reached here, whether the suit brought by respondents be merely for possession or to try title.

3. The sole attempt of the court of appeals to reconcile its decision with the *Larson* case is based upon this Court's introductory observation, "There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions" (337 U.S. at 686; R. 36–37). The present case is different from *Larson*, the court of appeals believes, because here the claim is that the petitioner "is wrongfully and tortiously holding possession of * * * [the respondents'] lands as agent for the United States, which does not have the right of such possession" (R. 37). The purported distinction proves too much. As we have just noted (*supra*, pp. 16–17), *Larson* is explicit that "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement", *i.e.*, the requirement that "the action to be restrained or directed is not action of the sovereign." In the sentence quoted by the court of appeals from *Larson*, this Court was merely separating (a) the question whether a suit, purportedly against an officer, is in effect a suit against the sovereign from (b) the quite different question whether the federal officer himself,

by virtue of his official position, has a personal immunity from suit and from personal liability for personal misconduct. The Court was not, as the court of appeals implies, suggesting that the officer's actions in *Larson* were not claimed to be "wrongful."[4] To the contrary, it was precisely in those terms that the Court itself stated the plaintiff's claim (337 U.S. at 692):

> If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.

Since the whole of the opinion in the *Larson* case was devoted to answering that very argument, the court of appeals' differentiation of the instant case on the ground that the petitioner's actions here are claimed to be "wrongful" and "tortious" is unsound.[5] It follows that the action is a suit against the United States without its consent under the rule of *Larson* v. *Domestic & Foreign Corp.*

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[4] Without an allegation of "wrongful" action the *Larson* action would have to be dismissed for failure to state a claim, without ever reaching the immunity issue. 337 U.S. at 689–691. See also *Yearsley* v. *Ross Constr. Co.*, 309 U.S. 18, 21; *Worcester County Co.* v. *Riley*, 302 U.S. 292, 296–297.

[5] As will be discussed, *infra*, pp. 29–33, Georgia ejectment is not solely a tort action. The fictitious pleading of lease, entry, and ouster are ignored and consequently cannot be considered as amou[illegible] to an allegation of "wrongfulness."

4. The court of appeals also relied on *United States* v. *Lee*, 106 U.S. 196, and *Land* v. *Dollar*, 330 U.S. 731, and found it "significant * * * that the Supreme Court [in *Larson*] did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case" (R. 37). It is true that the Court in the *Larson* opinion distinguished, rather than overruled, those cases, but it "distinguished" them in a way which deprived them of whatever applicability they might otherwise have had to the facts of this case. The Court stated in *Larson* that the *Lee* decision was based upon "the assumed lack of the defendants' constitutional authority to hold the land against the plaintiff," and was "a specific application of the constitutional exception to the doctrine of sovereign immunity" that property may not be taken by the United States without making provision for the payment of just compensation. 337 U.S. at 696–697. In *Larson*, the Court also noted that the *Lee* case was decided in 1882 when there was no remedy by which the plaintiff could obtain compensation for the alleged taking of his land as required by the Constitution. U.S. Const., Amend. V; 337 U.S. at 697, note 17. The *Lee* opinion itself makes this clear. 106 U.S. at 218–222.

There is no claim in this case that the petitioner's holding of the property constitutes an unconstitutional taking, but if such a claim were made it would be defeated by the present availability of a suit for compensation—not specific relief—against the United States directly under the Tucker Act, as pointed out in *Larson*. 337 U.S. at 697, 703, notes 17, 18 and 27; cf. *Hurley* v. *Kincaid*, 285 U.S. 95, 104. The court

of appeals repudiates the *Larson* discussion upon this point, stating that "this contention was specifically rejected in *Dollar, infra*" (R. 31). *Dollar*, however, rejected the contention only where federal officers "*unlawfully* seize or hold a citizen's realty or chattels * * *." 330 U.S. at 738. *Larson* stressed that in *Dollar* there was a claim that the officers' actions violated a statutory limitation on their authority. 337 U.S. at 702, note 26; 330 U.S. at 738. That is not the case presented here where the respondents admit that the petitioner is acting solely for the sovereign and within the limits of his authority.[6]

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[6] The subsequent history of the *Dollar* litigation is of interest in connection with the claim that a suit against an officer will not prejudice the rights of the United States. After this Court's decision in *Land* v. *Dollar*, 330 U.S. 731, a trial on the merits was held in the District Court for the District of Columbia and judgment entered against the Dollar interests. This was reversed by the Court of Appeals for the District of Columbia Circuit which ruled in favor of the Dollars. The United States then commenced, in its own name, an action in the Northern District of California to quiet its title to the stock. There then ensued a controversial series of proceedings, including a conflict between the Ninth and District of Columbia Circuits as to the jurisdiction of the former. Each considered orders to show cause in contempt and applications for restraining orders. The District of Columbia Circuit even suggested that the action in California be "voluntarily" dismissed if necessary to comply with its order. Finally, the controversy was settled out of court and the cause became moot, resulting in dismissal of the proceedings. See *Dollar* v. *Land*, 82 F.Supp. 919 (D. D.C.), reversed and remanded, 184 F.2d 245 (C.A. D.C.), certiorari and motion for rehearing denied, *sub nom. Land* v. *Dollar*, 340 U.S. 884, 948, motion for reconsideration continued, 341 U.S. 737, 738, motion withdrawn, 344 U.S. 807; *Land* v. *Dollar*, 188 F.2d 629 (C.A. D.C.), certiorari denied, 340 U.S. 948; *United States* v. *Dollar*, 97 F.Supp. 50

own. Since the petitioner is sued in his official capacity as a federal officer, he necessarily would be compelled to assert the title under which he occupies the land—the title of the United States. And since the United States can use and possess property only through its officers, the title and possession of the United States would be adjudicated if this ejectment action were allowed. While the United States may not be concluded by a judgment against the petitioner, its interests in managing the property would be affected and a cloud would be cast upon its title until directly litigated by the United States with the respondents. Moreover, the respondents obviously do not wish to contest possession, much less title, with the petitioner. He neither claims title in himself nor occupies the lands in his private capacity. The respondents conceded this in the district court (R. 16–17). Petitioner's ouster is not the respondents' real object, and the federal government's replacement of the petitioner by another forest service officer would not placate the respondents. It is relief against the United States—and not against the petitioner—which the respondents seek in reality and which the court of appeals declares may be granted.

Except perhaps for cases in which the title and possession of the United States violate the Constitution or a federal statute, the accepted rule is that a suit, like the present one, directly involving the possession and title of property in which the government has a substantial claim of interest, is a suit against the sovereign.

1. The Court recently declared (*Leiter Minerals, Inc.*, v. *United States*, 352 U.S. 220, 226) that "* * * under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." This accords with the established law. In *Morrison* v. *Work*, 266 U.S. 481, the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress. It was asserted that the acts unconstitutionally deprived the plaintiff and other members of the Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property, which the United States claimed the property to be. The Court declared (at 485–486):

> The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued. * * *

Other decisions of this Court also show that the United States is an indispensable party where its title and possession are in issue. All of the following cases decide that a suit directly involving the use, possession, or title of property in which the United States or a state claims an interest is a suit against the sov-

ereign. *Minnesota* v. *United States*, 305 U.S. 382, 386; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Leather* v. *White*, 266 U.S. 592, affirming 296 Fed. 477 (C.A. 7); *New Mexico* v. *Lane*, 243 U.S. 52, 57–58; *Lankford* v. *Platte Iron Works*, 235 U.S. 461; *Goldberg* v. *Daniels*, 231 U.S. 218; *Hopkins* v. *Clemson College*, 221 U.S. 636, 648–649; *Louisiana* v. *Garfield*, 211 U.S. 70, 77–78; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475–476; *Oregon* v. *Hitchcock*, 202 U.S. 60, 69–70; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387; *Stanley* v. *Schwalby*, 162 U.S. 255, 270, 272; *Belknap* v. *Schild*, 161 U.S. 10.

This rule is applicable not only where the United States' title or possessory right is conceded, but in every case where its claim is not merely colorable. *Louisiana* v. *Garfield, supra; Morrison* v. *Work, supra; Stanley* v. *Schwalby; supra; Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Goldberg* v. *Daniels, supra; New Mexico* v. *Lane, supra; Leather* v. *White, supra.* In the *Garfield* case, for example, the state filed a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title to certain lands claimed under the swampland acts. In response to a demurrer, lodged on the ground that the suit was against the United States, Louisiana argued (211 U.S. at 72–73):

> According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no

> longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill for want of jurisdiction, the Court refused to let jurisdiction depend upon the complainant's allegations of title. Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit * * *." 211 U.S. at 75. He then briefly reviewed the state's arguments that it had good title to the land, stated that at least the case was doubtful, and concluded (211 U.S. at 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

Thus it was definitely held that, although on the theory and allegations of the bill the United States had no interest, nevertheless the United States' claim was at least substantial and the suit must fail at the outset.

That is the case presented here, where the district court was apprised in an early phase of the case of the government's claim of interest (R. 1-3). The sub-

stantiality of that claim is manifest from the fact that this land was acquired in 1936 by the United States by direct purchase (R. 1) and that there could not have been an acquisition without an opinion of the Attorney General that the title was valid, based upon an examination of the abstract of title, deed, and related papers. R.S. 355, 40 U.S.C. 255, Appendix, *infra*, p. 41.

The same ruling on the defense of immunity was rendered in *New Mexico* v. *Lane*, 243 U.S. 52, 57–58, where the state asserted full title to certain lands formerly part of the public domain, and the United States controverted that claim. And in *Stanley* v. *Schwalby*, 162 U.S. 255, where the private plaintiffs and the defending officials engaged in a spirited dispute as to title to the land, the Court first held, without determining the merits, that the suit was against the United States and its property, and then "with a view to the ultimate determination of the case" (162 U.S. at 272), it upheld the government's claim on the merits. Similarly, in *Goldberg* v. *Daniels*, 231 U.S. 218, the private plaintiff claimed ownership of the vessel in himself, while the government official pleaded title in the United States. Illustrating that a mere claim of title in a private plaintiff is not controlling, the Court, without determining the issue of title, held that the suit must fail as one against the United States.

The net result of these authorities is that in this action, which is essentially to try title, the United States is an indispensable party which cannot be joined for lack of consent.

2. We think it clear that this ejectment action was converted into a suit to try title when title was claimed, on substantial grounds, to be in the United States. Both title and possession are basically involved in an ejectment action. The recovery of both, together with mesne profits and damages, is the general objective of the action. Stated another way, "title, however, must be established in order to warrant a recovery, and the establishment of such title, though nominally a mere incident, is in reality the object of the action. Hence, this convenient form of suit came to be adopted as the usual method of trying titles to land." Black, *Law Dictionary* (4th ed. 1951), Ejectment, p. 607. A recent declaration that the denial of a plaintiff's title puts the question of title in issue and converts ejectment into a suit to try title appears in Mr. Justice Douglas' dissenting opinion in *Parker* v. *Ellis,* 362 U.S. 574, 595:

> In Delaware, prior to its adoption of a modern code of civil procedure, the action of ejectment was based on a series of fictions. The declaration averred a lease to a fictitious lessee, and the ouster by a fictitious ejector "which when proven or admitted by the consent rule" left "the question of title as the only matter to be determined in the case." [Citation omitted.]

See also *Shapiro* v. *Christopher,* 195 F. 2d 785, 792–793 (C.A.D.C.).

The court of appeals' opinions in this case are founded upon the erroneous premise that this is not a suit to try title, possession alone being involved in Georgia ejectment (R. 25, 38–39, 53–55). That view

cannot be harmonized with the court of appeals' own statement that under the complaint and the relevant Georgia statutes the respondents will be able to prove title to be in themselves and that "the United States did not own any title" (R. 25). If the respondents, who are not in possession, may attempt to show that the United States does not have any title, the title of the United States must be in issue. In addition, a plaintiff out of possession must necessarily prove a title superior to the defendant to establish a right to possession, and the right of the defendant in this case (petitioner here) rests wholly on the title of the United States.

Moreover, the Georgia cases disclose that more than possession and damages are involved in a Georgia ejectment action. Declarations by the court below that the "purpose of the action is to eject the defendant from possession of the land," citing *Vinson* v. *Cannon*, 213 Ga. 339, 341 (R. 25, note 6); that "the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone" (R. 53); and that nothing in the Georgia law makes ejectment a suit to try title exclusively (R. 54), do not fully reflect the proof necessary to eject a defendant nor the real issue in Georgia ejectment.

Thus, in *Lopez* v. *Downing*, 46 Ga. 120, 125, the Supreme Court of Georgia described Georgia ejectment actions in this manner:

> It [Georgia ejectment] *is an action to try titles to land*—a fictitious proceeding, in which John Doe alleges that, having leased from A B certain

> land, Richard Roe, with sticks and stones, drove him out, and did him great damage. This looks very tortious; but the writ is to be served on the tenant in possession, and *he is required by law* * * * *to admit* [emphasis added], in effect, everything charged against him, to-wit: lease, entry and ouster. Having done this, admitted the trespass, he may defend—that is, the *real action* goes on.

The Supreme Court of Georgia repeated this view of a Georgia ejectment action in *Brewster* v. *Wooldridge*, 100 Ga. 305, 306, 308–311, in declaring (at 305–306):

> We are now to inquire whether, under the act referred to, the common law action of ejectment, *as a remedy for the recovery of the possession of land and the trial of titles to land, is abolished.*[*] It would be unprofitable here to state the origin, and to inquire into the history of this form of action. The best argument to be found in favor of its utility, and of its adaptability to the purposes to which it has heretofore been applied, is to be found in the fact, that *wherever in this State titles to land have been called in question, the legal profession has with singular unanimity turned to this as the best and simplest method of bringing to the atten-*

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[*] In 1799 the Georgia legislature simplified pleading requirements, but the statute was held not to have abolished the common law fictitious form of pleading in ejectment. The 1847 authorization of an alternative form of action to try titles expressly preserved the fictitious form of pleading. In 1893 the Georgia legislature again simplified the method of pleading. The issue in the *Brewster* case was whether the common law form of pleading in ejectment was thereby abolished. 100 Ga. at 306–307.

> *tion of the court the real issue, as to which party, whether plaintiff or defendant, had the better title to the premises in dispute.* By the application of the consent rule, which admitted lease, entry and ouster, and that other rule, adopted by the judges in convention, *which required the defendant,* before he pleaded to an action of ejectment, to admit his possession of the premises claimed, the courts have been enabled to strip the action of all superfluous matter, and bring the parties to a direct issue *upon title alone;* and notwithstanding all the legislation which has occurred heretofore in Georgia looking to a reform of our methods of procedure, this form of action, commended by considerations of utility and simplicity, has alone survived. [Emphasis added.]

The court continued (100 Ga. at 309):

> Both the action of ejectment as at common law, and complaint for land as the latter existed under our code, were originally mere possessory actions; but the rule of the superior court which first required the defendant, in an action of ejectment proper, to admit possession as a condition precedent to his being permitted to plead, *so far changed the character of the action as to eliminate entirely the question of possession,* and refer the contesting parties to the titles under which they claimed the right of possession.* [Emphasis added.]

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* The common law consent rule was adopted at a convention of Georgia judges in 1879. It was later included in the Georgia Codes of 1895, 1910, and 1933, and was adopted by act of the Georgia legislature. *Elliott* v. *Robinson*, 192 Ga. 682, 683.

The court then concluded (100 Ga. at 311):

> The wisdom of the General Assembly may suggest a better means for the trial of titles to land; but the writer ventures the opinion that human ingenuity has never yet been and never will be able to evolve a system which surpasses in utility the one now under consideration, or one more simple, when it is thoughtfully studied, carefully considered and well understood. [redacted]

See also *Sweat* v. *Atlantic Coast Line R. Co.*, 81 F.2d 492, 493 (C.A. 5); *Nottingham* v. *Elliott*, 209 Ga. 481, 482; *Ramey* v. *O'Byrne*, 121 Ga. 516, 520; *Bright* v. *City of Washington*, 95 Ga. App. 84, 86.

II

The Doctrine of Sovereign Immunity as Here Applied Is Not Unjust

Thus far, our argument has been concerned with the traditional conceptions and doctrines of sovereign immunity. We have tried to demonstrate that this case is governed by those conceptions and doctrines and that the court of appeals' decision denies the application of settled principles. But we do not rest solely on precedent or history. Our argument is also founded on governmental considerations which we now discuss.

A. The judgment sought by the respondents would expend itself on the public domain and interfere with the public administration

The doctrine of sovereign immunity does not now stand in high repute with many jurists and lawyers, but the conception is imbedded in the Consti-

tution and continues to be largely accepted by Congress and the state legislatures which have the power to consent to suits. The doctrine has, moreover, substantial justification when given its proper place. We believe that it is not unjust to apply it to this class of case. There is here neither an abrupt seizure of truly private property nor an abuse of governmental regulatory power. The government has been in possession since 1936 under deed (R. 1) and the land is being utilized by the Forest Service for the benefit of the general public. Nothing was adduced in the district court or the court of appeals to indicate that the respondents have ever been in possession. Indeed, the respondents themselves in their brief on appeal stated that their claim was based upon a will executed and recorded over 100 years ago in 1857 (see *supra*, p. 6, R. 44). The respondents' "contentions [of ownership]" are not to the contrary (R. 49–51). Nor is there any claim that the petitioner has acted unconstitutionally or in excess of his statutory authority. Rather, "there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved" (R. 17).

For the government, maintenance of the immunity in cases of this type serves important practical ends. In *Dollar*, the Court referred to the "practical considerations reflected in the policy which forbids suits against the sovereign without its consent" (330 U.S. at 733) and there laid down a general

practical test which would designate this suit as one against the United States. The "essential nature and effect of the proceeding" are such that the judgment sought would both "expend itself on the public * * * domain" and "interfere with the public administration." 330 U.S. at 738. Since the United States can occupy its land only through its officers and agents, a court order ejecting the petitioner would in effect eject the United States. Under the decision below, the government's choice of officers who are to occupy and manage its property would likewise be thwarted. And the mere pendency of an action such as this may well prevent proper use, or disposition by lease or otherwise (if the government so desires), of the property—to the prejudice of efficient administration. Cf. *Jones* v. *Securities Commission*, 298 U.S. 1, 17–18.

The United States owns and occupies an enormous amount of land, used for all kinds of governmental purposes.[10] If private individuals can oust the government from possession on the ground of some defect in the government's title, a broad range of federal programs—from a national forest to land needed for space projects at Cape Canaveral—will conceivably be vulnerable to termination or to interference through prolonged litigation. Specific relief, as contrasted to money damages, creates serious

[10] The United States owns more than 407 million acres of land as part of the public domain or which have been acquired by purchase, condemnation, or otherwise. S. Doc. No. 100, 84th Cong., 2d Sess. (1956), p. 55.

problems recognized by this Court in its *Larson* opinion (337 U.S. at 703–705):

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. * * *
>
> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen

> in being relegated to the recovery of money damages after the event.

Such affirmative judicial intervention in governmental affairs runs counter to the repeated admonition that "[t]he interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *." *Decatur* v. *Paulding,* 14 Pet. 497, 516; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 131–132. That fundamental principle operates to compel the designation of an action for a judgment which would interfere with the public administration as a barred suit against the United States.

In addition, the *Larson* opinion acknowledges that it is for the legislature, not the courts, to choose the instances in which specific relief should be made available against the sovereign (337 U.S. at 705):

> It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names.

> In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims. The differentiations as to remedy which the Congress has erected would be rendered nugatory if the basis on which they rest—the assumed immunity of the sovereign from suit in the absence of consent—were undermined by an unwarranted extension of the *Lee* doctrine.

Congress has the responsibility of extending remedies, and it can do so in properly selective fashion. Thus far, it has normally restricted relief to money damages only. The Tucker Act authorizes no specific relief against the government, and the Federal Tort Claims Act is also restricted to claims for money damages only. See 28 U.S.C. 1346(b); 60 Stat. 842 (Sec. 410(a)). These legislative consents-to-suit indicate the consistent congressional policy against relief other than money damages. This express policy, reflecting the needs of public administration, properly bears much weight in deciding whether suits like the instant suit for affirmative relief against a government officer should be viewed as unconsented suits against the United States.

B. THE PRIVATE CLAIMANT IS NOT LEFT UNPROTECTED

Barring the private claimant from obtaining specific relief against the government in these land cases does not leave him unprotected. First, the Congressional requirement that the Attorney General must approve the title on all land acquisitions (Appendix, *infra*, p. 41), while imposed for the protection of the United States, in practical operation protects claimants in al-

most all cases since defects in the title the government purchases must be cleared or it must be concluded that the infirmities will not jeopardize the interests of the United States—meaning that the outstanding interest will be respected."[11]

Furthermore, it is often possible to sue for damages under the Tucker Act, 28 U.S.C. 1346(a) and 1491, or the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*[12] A suit in the Court of Claims or in the federal district court seeking money damages would give the claimant as complete a remedy as he is entitled to in the circumstances, considering that the government has the additional power of eminent domain. If the government agency did not desire to retain the land after a finding that the United States does not have title, that fact could be made known in partial defense of a Tucker Act proceeding. We mention this factor because, absent express indication of intent by authorized government officers, it would be somewhat doubtful whether the taking was temporary or permanent. See *United States* v. *Causby,* 328 U.S. 256, 267–268; *United States* v. *Dow,* 357 U.S. 17, 21. If permanent retention of the land were needed and authorized for governmental purposes, there could then be a taking of the fee title.

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[11] The government is also usually willing to bring its own actions to quiet titles to lands in its possession where substantial, reasonable, and active claims may be asserted by private citizens. See, *e.g.*, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *Patterson*, 206 F. 2d 345 (C.A. 5).

[12] From the facts as they appear, there is every indication that in this instance a Tucker Act or Tort Claims Act suit was long since barred.

The court of appeals below, citing the instances "in which Congress has specifically withdrawn sovereign immunity" (R. 32), seems to consider this type of legislation as warrant for extending the waiver of sovereign immunity by judicial action. But the court forgets that congressional waivers have not been without significant qualifications and pursuant to a consistent congressional policy. Claims under the Tucker Act, for example, must be asserted within six years after the right of action first accrues. 28 U.S.C. 2401(a). In the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, *et seq.*, Congress, in addition to imposing a short limitation period, excised a large number of claims, including actions based upon the exercise by federal officers of discretionary functions. 28 U.S.C. 2401(b) and 2680. Above all, as we have already emphasized, a dominant policy has been to permit suits for money damages only and in general not to allow specific relief against the government.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed and that the district court's dismissal of the respondents' ejectment suit for lack of jurisdiction should be affirmed.

Respectfully submitted.

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DECEMBER 1961.

APPENDIX

R.S. 355, as amended, 40 U.S.C. 255, provides:

> No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.
>
> Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: *Provided,* That the total value of any lands or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except roads, trails, and fire-

protection improvements) on any site tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this section, values of lands and interests in land shall be determined by the consideration paid or to be paid.

The Attorney General is authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

Nothing in this section shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this section be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

The Attorney General may, in his discretion, base any opinion as to title required either by this section or any other law upon either or both of the following: Certificates of title of

title companies or such evidence of title as he may deem satisfactory.

The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of the Army, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on October 9, 1940, with respect to the approval by them of title to land or interests in land acquired by the Department of the Army or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law, be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for the acquisition or improvement of easements and rights-of-way by the Department of Agriculture for forest and other conservation purchases where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500; and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer or any department or independent establishment or agency of the

Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

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SUPREME COURT, U. S.

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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1961

BUFORD MALONE, JR., PETITIONER

vs.

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether an action may be maintained by one private citizen to eject another private citizen from lands in which the defendant sued is claiming to be a Federal Officer and is holding possession of the land as a Federal Officer.

STATEMENT

This is a suit by private parties to eject a citizen of the United States who comes into court and says that he is holding the land by virtue of being a Forester for the United States and is claiming title to the land on behalf of the United States. He contends that he is not

holding individually and his only right of possession is as a Forester employed by the Forest Service of the United States.

The Motion for More Definite Statement, (R 10-13), was not heard before the District Court, but it was expressly agreed that this question would remain open pending a hearing on a jurisdictional question.

The only thing involved in this case is a question of Jurisdiction.

Petitioner in his statement (Br. 6, 2nd paragraph) is attempting to bring into the record the merits of the case as to who has the title to the property. That is a question to be decided upon a trial. In the same paragraph he cites a portion of the record, (R. 49-50-51), which is merely a letter from the writer of this brief to the Attorney General and United States Attorney attempting to settle the case by laying the facts before these gentlemen so that we might decide who has the title to said property without the necessity of a trial.

The statement of petitioner, insofar as it cites the record, is substantially correct, but the conclusion drawn therefrom is not admitted to be correct.

SUMMARY OF ARGUMENT

I.

This is a suit by the respondents against petitioner to oust the petitioner from lands in Jasper County, Georgia. The suit was brought in the State Court of Georgia and removed to Federal District Court. The United States has been dismissed as a party and the only issue is whether a suit can be maintained against petitioner to oust him from possession of this land.

The question of whether the United States is contending that it owns the land is not involved in this suit.

The chief reliance of the respondents is as stated by petitioner in the case of U. S. vs. Lee, 106 U. S. 196, and Land vs. Dollar, 330 U. S., 731.

The Lee case is identical with this case, and the questions of law presented in the Dollar case are controlling. The only relief asked for in this case is the ejectment of petitioner from the land, and the only relief that the Court could give would be a writ of possession ousting petitioner from the land.

II.

(a.) It would be most unjust for an individual to oust another citizen of the United States from land, and then in a suit for possession of the land brought by the alleged owner, for the defendant in the case to come into court and say, "You cannot oust me for I am holding government land."

This is not in any way interference with the efficient administration of government of the public domain and it does not ask for specific relief as in Larson vs. Domestic and Foreign Corp., 337 U. S., 682.

(b.) The Tucker Act will not give the respondents complete and adequate relief as the government could possibly come in and say they are not claiming the land involved in this case.

ARGUMENT

So far as the rules of the Court permit, I adopt the clear, concise and excellently delivered opinion of Judge Cameron of the Fifth Circuit Court of Appeals, (R 21-39). I will not burden this Court by rewriting

this opinion in a different narrative form, but agree that everything that he says in the opinion is correct.

Respondents say they have the right to proceed against the defendant, Buford Malone, Jr., to take possession of this land in an ejectment suit, if the case is made out, under the authority of:

U. S. vs. George W. P. C. Lee

and under the same case, cited together of Frederick Kaufman, et al. vs. George W. P. C. Lee, 106 U. S. beginning at page 196

This case was to recover possession of a parcel of land of about 1100 acres known as the Arlington Estate. It was an action of ejectment in the form prescribed by the statutes of Virginia, under which the pleadings are in the name of the real parties, plaintiff and defendant.

Of course, in Georgia, the fictitious form of ejectment is usually used.

This case was one in which the plaintiff had received title from his grandfather, George Washington Parke Custis, who devised the Arlington Estate to his daughter, the wife of Gen. Robert E. Lee, for life, and after her death to the plaintiff.

The case at bar is one in which the plaintiffs contend that the land described in the petition was willed to their mother, Martha Toland, later Sanders, then Bowdoin. This land was willed to her, for her lifetime, and at her death to her children.

The daughter of Michael Toland died in 1928, and we contend at that time title descended into plaintiffs, or where a deceased child of Mrs. Bowdoin had died prior to suit, into her grandchildren, who are some of the plaintiffs herein.

The Lee case is ample authority that jurisdiction of this case lies to recover possession of the property from Buford Malone, Jr.

Sawyer vs. Osterhaus, 195 Fed., 655 and 212, Fed. 765.

In this case the plaintiff brought his action against an Admiral of the Navy for possession of lands. The Court held that the suit could be maintained. The case was lost for the plaintiff on the merits, because he was unable to prove title, but the holding was that such an action would lie and bears out our contention that the action will lie against Mr. Buford Malone, Jr.

Emory S. Land (Chairman, U. S. Maritime Commission) Howard L. Vickery (Vice-chairman, U. S. Maritime Commission) et al. vs/ R. Stanley Dollar, Dollar Steamship Line, J. Harold Dollar Estates Company et al., 330 U. S., 731-743.

This was an action by Dollar to recover stock held by Land et al. which the petition alleges was pledged to secure a loan which had been paid.

The Court, on page 737, headnote 2, held as follows:

"Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of U. S. vs. Lee, 106 U. S. 196, has been repeatedly approved."

On page 738 in headnote 5, the Court held as follows:

"And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory

action to reclaim that which is wrongfully withheld."

"It is in the later category that the pleadings have case this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents or pledgors they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be res judicata sa against the United States, (See U. S. vs. Lee, 106 U. S., page 222)".

We contend that the Respondents here own the title to the land described in the complaint, and that whether acting as an individual or acting as an officer of the United States, Mr. Malone, the Petitioner, is acting beyond his authority in holding possession of land of the Respondents and that we are entitled to proceed with this ejectment suit against him to test his possession upon the merits of the case.

Larson vs. Domestic and Foreign Corp., 337 U. S. 682, is foreign to the issues in this case.

The Larson case was a case in which the Domestic Corp. contended it had bought coal belonging to the United States from a prior administrator and asked equitable relief decreeing title into the petitioner in the case, and enjoining the Administrator from selling the coal belonging to the United States to another purchaser.

In that case the relief sought was to take over the coal belonging to the United States requiring an equitable decree for specific performance of a contract which would require the Administrator to sell the coal belonging to the Government. In most jurisdictions, and especially in Georgia, specific performance is an equitable remedy and cannot be used in sales or contracts for sales of personal property, but is limited to require specific performance of contracts for the sale of realty. In sales of personalty, one is relegated to a suit for damages.

Petitioner in his brief contends that ejectment in Georgia is an action to try title to land. This is incorrect. It is a mixed action, partly for tort, and partly for trial of title. It can be either one. In this case we are contending that petitioner tortiously went on our land and is attempting to hold same without right or title.

The standing of petitioner in this case would be no better as to jurisdiction than if an enforcement officer of the Alcohol Tax Unit of the Treasury Department were trying to catch a liquor runner in an automobile and the Agent's car gave out of gas, whereupon he commandeered an automobile of a motorist on the highway and then in a trover suit filed by the motorist to recover the automobile from the Treasury Agent, the Treasury Agent came into court and said, "I am not claiming this automobile for myself. It belongs to the United States government and you cannot claim title."

In Footnote 10 at the bottom of page 35 of petitioner's brief he stated that: "The United States owns more than 407,000,000 acres of land as part of the public domain . . ."

If this case is reversed and a suit could not be brought in this type case, then the United States could own all of the land located within its boundaries by having Agents or Forestry Officers or Bureau of Roads Officers to obtain possession of lands of private citizens and then, when the citizen tries to get it back, say that the official is not claiming except under some duty of his position which he believes entitles him to hold the land. For instance, if a janitor at a post office caught the owners of a home next door away on vacation, and moved into their home he could say that he is not living in there as an individual, but that his duties as janitor of the post office next door require that he live adjacent to the post office and that he is only holding the property under color of title for the benefit and convenience of the United States.

In Footnote 11, page 39, of the Brief for Petitioner the following is stated: "The government is also usually willing to bring its own actions to quiet titles to lands in its possession where substantial, reasonable, and active claims may be asserted by private citizens."

At the pre-trial conference held before Judge Bootle when he rendered his decision, the respondents through this attorney, offered to cut a hollow tree on the land and let the government bring an action against respondents for trespass, or any other action they desired, and this matter could be settled. The Assistant Attorney General appearing for Mr. Malone has declined to bring an action that the Solicitor General and attorneys for the Department of Justice now seem so willing to have this Court believe that it would do. If such an action were brought then this case would probably become moot.

The appendix contained in petitioner's brief beginning on page 41 has no probative value in any Court. This is only a directive by Congress to the Attorney General to examine titles to land purchased by the United States. The fact that the Attorney General examines a title does not mean that he is infallible and cannot make an error or omission in the examination. His certificate of title would not be evidence. He would have to show good title.

To reverse this case, it seems to me that it will be necessary for the Court to expressly overrule the Landmark Cases of United States vs. Lee, 106 U. S. 196, and Land vs. Dollar, 330 U. S. 731.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the Court of Appeals is correct, and should be affirmed.

Respectfully submitted.

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January, 1962